NEW

COMMENTARIES

ON



THE LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

BY

HENRY JOHN STEPHEN,

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Fourth Edition.

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IN FOUR VOLUMES.

VOL. III.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

HODGES, SMITH & CO., GRAFTON STREET, DUBLIN.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

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NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*).

PART II.

OF THE CHURCH.

HAVING now finished our examination of that division of public rights which concerns the relation between persons in *civil* authority, and those who are subject to that authority,—which involved the whole law relating to the *State* or *civil* government,—we are next to turn our attention to such public rights as are connected with the relation between those who have power in matters *ecclesiastical*, and those over whom that power is exercised,—which latter subject we shall discuss, as proposed in a former place (*a*), under the general head of the *Church*.

The Church, in that sense of the term to which these Commentaries refer, may be defined as an institution established by the law of the land, in reference to religion; in treating of which we shall find it convenient to consider, *first*, the authorities established in the Church; *secondly*, the law relating to its doctrines, worship, and discipline; *thirdly*, the law relating to its benefices or endowments. And, first, of the authorities established in the Church.

(*a*) Vide sup. vol. II. p. 324.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE ecclesiastical authorities consist (under the sovereign, the common head of the Church) principally of the *clergy*, (a venerable body of men set apart from the rest of the people or *laity*, in order to superintend the public worship of Almighty God and the other ceremonies of religion, and to administer spiritual counsel and instruction.)

The clergy consist of such, and such only, as have been admitted into *holy orders*; which, in the Church of England, are the orders of bishops (including archbishops), priests, and deacons (*a*): and the ordination in that Church must take place according to the form prescribed in the Book of Common Prayer (*b*). By 13 Eliz. c. 12, and 44 Geo. III. c. 43, it is provided (conformably to the canons), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years of age;—though as to deacons, the Archbishop of Canterbury has the privilege of admitting them, (by faculty or dispensation,) at an earlier period (*c*). Also by the same statute of Elizabeth,

(*a*) The Roman canonists had the orders of bishop (in which the pope and archbishops were included), priest, deacon, subdeacon, psalmist, acolythe, exorcist, reader, ostiarius. Corv. Jus Canon. 38, 39; Gibs. Cod. 115.

(*b*) See 2 Burn's Eccl. Law, 103; Wats. C. L. ch. xiv. By 59 Geo. 3, c. 60, s. 3, no person ordained by a foreign bishop can officiate in any church or chapel of England or Ireland, without special permission from the archbishop of the Province; or be admitted to any ecclesiastical preferment in England or Ireland without consent both of archbishop and bishop.

(*c*) "Bishops, Priests and Deacons "are the ministerial orders known "to the episcopal establishment of "England. In the *Bishop* lies the

none shall be ordained either priest or deacon, without first subscribing the Thirty-nine Articles of religion: nor, by 1 Eliz. c. 1 and 1 W. & M. c. 8, without first taking the oaths of allegiance and supremacy (*d*). Moreover, by the canon law (*e*), no person shall be admitted into holy orders without a *title* (as it is called); that is, unless he produce to the bishop a presentation to some ecclesiastical living within the diocese, or such certificate of preferment or provision as in the canon described; or unless he be a fellow or chaplain in Cambridge or Oxford, or master of arts of five years' standing in either of such universities, and living there at his own charge: or unless the bishop himself intends shortly to admit him to some benefice or curacy. And we may observe further, that [by 31 Eliz. c. 6, if any person obtain orders, or a licence to preach, by money or corrupt practices, (which seems to be the true, though not the common, notion of *simony*,) the person giving such orders shall forfeit 40*l*., and the person receiving, 10*l*.; and the latter is incapable of any ecclesiastical preferment for seven years afterwards.]

In order to attend the more closely to their duties, the clergy have certain privileges. [and had formerly much greater, which were abridged at the time of the Reformation, on account of the ill use which the popish clergy had endeavoured to make of them. For the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie (*f*).

"power of ordination. *Deacons*, when "ordained, may, licensed by the "bishop, preach and administer the "rite of baptism. *Priests*, by this "ceremony, are further empowered "to administer the Lord's Supper, "and to hold a benefice with cure "of souls."—Report of the Registrar-General on the Religious Worship of England and Wales, December, 1853, (founded on the census of 1851), p. xxxiv.

(*d*) By 24 Geo. 3, c. 35, the bishop of London, or other bishop by him appointed, may ordain aliens to exercise the office of deacon or priest out of the dominions of the crown, without the oath of allegiance.

(*e*) Can. 33; Wats. C. L. 147.

(*f*) The marriage of the clergy was, in the time of popery, prohibited; but the prohibition was taken away by 2 & 3 Edw. 6, c. 21. Among the privileges by which the clergy

[But it is observed by Sir Edward Coke (*g*), that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost, or enjoyed not, those which of right belonged to them.] The personal exemptions do indeed in several instances continue. [A clergyman cannot be compelled to serve on a jury (*h*);] nor [can he be chosen to any temporal office, as bailiff, reeve, constable, or the like—in regard of his own continual attendance on the sacred function (*i*). During his attendance on divine service,] *eundo, morando, et redeundo*, [he is privileged from arrests in civil suits (*k*);] and the glebe and tithes of his parsonage are not liable to be seised in execution to satisfy a judgment in the same manner as lay property, but to a *sequestration*, by which the sum due on such judgment is directed to be levied by the churchwardens out of the profits of his benefice, after making provision for the service of the church (*l*). [But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations.] By 41 Geo. III. c. 63, they are incapable of being elected members of the House of Commons (*m*); and by 5 & 6 Will. IV. c. 76, s. 28, of being councillors or aldermen in boroughs. They are also

were once very particularly distinguished, was what was called the *benefit of clergy*, antiently allowed to them alone. As to this vide post, bk. VI. c. XXIII.

(*g*) 2 Inst. 4.

(*h*) 6 Geo. 4, c. 50, s. 2. He is also, by the statute of Marlbridge, 52 Hen. 3, c. 10, discharged from attendance upon courts leet and the sheriffs' tourns; antient courts of criminal jurisdiction, now almost superseded by the court of quarter sessions. F. N. B. 160; 2 Inst. 4.

(*i*) Finch, L. 88.

(*k*) See stat. 50 Edw. 3, c. 5; 1 Ric. 2, c. 15; 29 Car. 2, c. 7, s. 6; 9 Geo. 4, c. 31, s. 23; 12 Rep. 100; Goddard *v.* Harris, 7 Bing. 320.

(*l*) See Ex parte Meymott, 1 Atk. 200; Burn's E. L. Sequestration; Arbuckle *v.* Cowtan, 3 Bos. & Pul. 326; Marsh *v.* Fawcett, 2 H. Bl. 582; Bishop *v.* Hatch, 1 Ad. & E. 171; Pack *v.* Tarpley, 9 Ad. & E. 468; Harding *v.* Hall, 10 Mee. & W. 42; Phelps *v.* St. John, 10 Exch. 895. See as to the remedies of sequestrators, 12 & 13 Vict. c. 67.

(*m*) Vide sup. vol. II. p. 372.

prohibited from farming or trading; for by 1 & 2 Vict. c. 106, ss. 28—30, (repealing some former acts on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or allowed to perform the duties of any ecclesiastical office,—shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title as in the act specified; and even in these excepted cases it is illegal for him to act as director or managing partner, or to carry on the trade in person (*n*). But, notwithstanding these prohibitions, the Act allows him to carry on the business of a schoolmaster; or to deal with booksellers as to the sale of books; or to be a managing director, partner, or shareholder in any benefit society, or fire or life insurance society; or to buy or sell to the extent necessarily incidental to his lawful occupation of land, or to sell minerals the produce of his land,—provided that none of such transactions be conducted in person, in any market or place of public sale.

[In the frame and constitution of ecclesiastical polity there are divers ranks and degrees, which we shall consider in their respective order, merely as they are taken notice of by the secular laws of England.]

1. An *archbishop* or *bishop* is constituted by election, confirmation, consecration, and installation; though an

(*n*) It is to be observed, however, that a contract entered into by a clergyman engaged in trade, contrary to the 29th section of 1 & 2 Vict. c. 106, may be enforced against him, under section 31 of the same act, though both parties contracted with a knowledge of the facts constituting the illegality, Lewis *v.* Bright, 4 Ell. & Bl. 917.

archbishop is more properly said to be enthroned and not installed (*o*).

The election of an archbishop or bishop is by the [chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy (*p*), till at length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, A.D. 773, by Pope Hadrian I. and the Council of Lateran (*q*), and universally exercised by other Christian princes: but the policy of the Court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy; which at length was completely effected: the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England (*r*), (as well as other kingdoms in Europe,) even in

(*o*) Bishop of St. David's *v.* Lucy, 1 Salk. 137; 3 Salk. 72. As to archbishops and bishops, vide sup. vol. I. p. 116; vol. II. p. 335; see also 5 & 6 Vict. c. 26, as to providing episcopal houses of residence; and 14 & 15 Vict. c. 60, as to the improper assumption of the title of archbishop, bishop, or dean, of any place in the united kingdom, under authority from the see of Rome.

(*p*) *Per clerum et populum*, Palm. 25; Sobrean *v.* Kevan, 2 Roll. Rep. 102; M. Paris, A.D. 1095.

(*q*) Decret. 1, dist. 63, c. 22.

(*r*) Palm. 28.

[the Saxon times: because the rights of confirmation and investiture were in effect, (though not in form,) a right of complete donation (*s*). But when, by length of time, the custom of making elections by the clergy only, was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring and pastoral staff or crosier,—pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory the seventh, towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them (*t*). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry the fifth agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future, *per sceptrum*, and not *per annulum et baculum*,—and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the court of Rome found it prudent to suspend for awhile its other pretensions (*u*).

This concession was obtained from King Henry the first in England, by means of that obstinate and arrogant prelate, Archbishop Anselm (*x*); but King John, (about a century afterwards,) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their

(*s*) Selden, Jan. Ang. l. 1, s. 39.

(*t*) Decret. 2, caus. 16, qu. 7, c. 12 et 13.

(*u*) Mod. Un. Hist. xxv. 363; xxix. 115.

(*x*) M. Paris, A.D. 1107.

[prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (on refusal whereof the electors might proceed without it); and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (*y*). This grant was expressly recognized and confirmed in King John's *Magna Charta* (*z*), and was again established by statute 25 Edw. III. st. 6, s. 3.]

But by statute 25 Hen. VIII. c. 20 (*a*), the law was again altered, and the right of nomination secured to the Crown; [it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to proceed to election;] called his *congé d'élire;* [which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters-patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province: if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate (*b*) the person

(*y*) M. Paris, A.D. 1214; 1 Rym. Fœd. 198.

(*z*) Cap. 1, edit. Oxon. 1759.

(*a*) Repealed by 1 & 2 Ph. & Mary, c. 8, s. 9, but afterwards revived by 1 Eliz. c. 1, ss. 7, 10. As to the bishoprics created by Hen. 8, viz., Chester, Gloucester, Peterborough, Bristol and Oxford, it is said in Co. Litt. by Harg. 134 a, n. (5), that they are donative. But it seems to be the practice as to all these, to issue a *congé d'élire*, (see The Queen *v.* Archbishop of Canterbury, 11 Q. B. 513;) and in the case of Gloucester and Bristol (now united), it it expressly directed that there shall be an election by the dean and chapter of each alternately. (Order in Council, 5 Oct. 1836.) No *congé d'élire* is issued with respect to the *Irish* bishoprics. (Bishop of St. David's *v.* Lucy, 1 Salk. 136.)

(*b*) A bishop, when consecrated, must be full thirty years of age; but there seems to have been no restriction of this kind in antient times. (Christian's Blackstone, vol. i. p. 379, cites Godw. Comm. de Præsul. 693.)

[so elected: which they are bound to perform immediately, without any application to the see of Rome. After which, the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this Act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*;] that is, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure (*c*).

There are two archbishops for England and Wales (*d*); the Archbishop of Canterbury, who has within his province all the bishoprics, (which are at present twenty-six in number,) except those of Chester, Durham, Carlisle, Ripon,

(*c*) 25 Hen. 8, c. 20. As to a *præmunire*, vide post, bk. VI. c. VI. The public attention has recently been drawn to the nature of the election of the bishops, and particularly to the question, whether the duty of the dean and chapter to elect the nominee of the crown, and that of the archbishop to confirm, invest, and consecrate such bishop elect, are to any extent optional; or whether they are merely ministerial duties: and the opinion of Blackstone, as stated in the text, appears to be the correct one. The discussion arose under the following circumstances. In 1848 (see Queen *v.* Archbishop of Canterbury, 11 Q. B. 483), the see of Hereford being vacant, the dean and chapter thereof received a *congé d'élire* to elect Dr. Hampden, the Regius Professor at the University of Oxford, to that bishopric. In accordance with this intimation of the pleasure of the crown, Dr. Hampden was in due course elected; but at the time of his *confirmation*, on the usual challenge to all objectors to come forward and be heard being delivered, certain objections, on the score of some of the religious tenets alleged to be held by Dr. Hampden, were tendered; but the officers in ministration refused to receive them. Upon this a rule was obtained by the objectors, in the Court of Queen's Bench, to show cause why a *mandamus* should not issue to the Archbishop of Canterbury to receive the objections: after solemn argument, however, it was decided (though the judges were not unanimous in their opinions) that the rule should be discharged; the chief ground of the decision being that the *congé d'élire* was imperative.

(*d*) Antiently there were three archbishoprics, the third being of

Manchester, and that of Sodor and Man; and the Archbishop of York, whose province comprises the six bishoprics just named.

The two archbishops for England and Wales, and the bishops of London, Durham, and Winchester, have the right, in virtue of their respective sees, to sit as lords spiritual, (having first received a writ of summons for the purpose,) in the House of Lords; and among the other bishops of England and Wales there are always twenty-one who hold seats there, under the like summons: but the number does not exceed this; the Bishop of Sodor and Man being in no case a lord spiritual, and the bishop last elected for the time being, being also excluded from that dignity. This is by the effect of the statute 10 & 11 Vict. c. 108, for establishing the new bishopric of Manchester; for though theretofore all the bishops (except the bishop of Sodor and Man) were summoned as a matter of course to the House of Lords, this statute provides that the number of lords spiritual shall not be increased by the creation of the new bishopric; but that whenever there shall be a vacancy among the lords spiritual, caused by the avoidance of any see, (other than the five above named, or than a see which shall be filled by the translation thereto from any other see of a bishop at that time actually sitting as a lord of parliament,) such vacancy shall be supplied by the issue of a writ of summons to that bishop who shall not have previously become entitled to such writ; and that no bishop who shall be thereafter elected to any see, not being one of the five sees above named, shall be entitled to have a writ of summons, unless in the order and according to the conditions aforesaid.

Caerleon in Wales; but in the time of Henry the first both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers's Eccl. L. 105.) The Archbishop of Canterbury was antiently Primate of Ireland also; Ireland having had no archbishop of its own till the year 1152. (Ibid. 106.)

[An archbishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy,] or as the law expresses it, the power to *visit* them (*e*). He confirms the election of the bishops, and afterwards consecrates them (*f*). He [has also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal (*g*). As archbishop he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet him in Convocation; but without the king's writ he cannot assemble them (*h*). To him,] as a superior ecclesiastical judge, [all appeals are made from inferior jurisdictions within his province: and as an appeal lies from the bishops, in person, to him in person; so it also lies from the consistory courts of each diocese, to his archiepiscopal court (*i*):] in addition to which he has also a court of original jurisdiction (*k*). [During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalties, and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (*l*). The archbishop is entitled to present by lapse, to all the ecclesiastical

(*e*) See Bishop of St. David's *v.* Lucy, 1 Salk. 134; Re Dean of York, 2 Q. B. 1.

(*f*) 2 Rol. Ab. 223. As to the power of the archbishop to consecrate to the office of bishop persons being subjects or citizens of foreign countries, see 26 Geo. 3, c. 84; 5 Vict. c. 5. As to his power in relation to the bishops and archdeacons of the West Indies, vide 6 Geo. 4, c. 88; 5 & 6 Vict. c. 4.

(*g*) The *secular* jurisdiction formerly belonging to the Archbishop of York and Bishop of Ely, was abolished by 6 & 7 Will. 4, c. 87; 7 Will. 4 & 1 Vict. c. 53; that belonging to the Bishop of Durham, by 6 & 7 Will. 4, c. 19.

(*h*) 4 Inst. 322, 323. As to Convocation, vide sup. vol. II. p. 534.

(*i*) See Ex parte Dennison, 4 Ell. & Bl. 292.

(*k*) As to the jurisdiction of the archbishop as an ecclesiastical judge, vide sup. Introd. p. 67, bk. II. pt. II. c. VII.; et post, c. II., bk. V. c. V., c. XIII.

(*l*) 2 Rol. Abr. 22.

[livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop (m); in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice within the bishop's disposal, within that see, as the archbishop himself shall choose; which is therefore called his *option* (n): which options are only binding on the bishop himself who grants them, and not on his successors (o). The prerogative itself seems to be derived from the legatine power formerly annexed by the popes, to the metropolitan of Canterbury (p). And we may add, that

(m) "Bishops are styled *suffragan* "(a word signifying *deputy*), in re- "spect of their relation to the arch- "bishops of their province. But "formerly each archbishop and bi- "shop had also his suffragan to assist "him in conferring orders, and in "other *spiritual* parts of his office "within his *diocese*. These, in our "ecclesiastical law, are called suf- "fragan bishops, and resemble the "*chorepiscopi*, or *bishops of the coun-* "*try*, in the early times of the Chris- "tian church. How this inferior "order of bishops may be elected "and consecrated, is regulated by "26 Hen. 8, c. 14; but, notwith- "standing this statute, it is not usual "to appoint them. This should not "be confounded with the *coadjutors* "of a bishop; the latter being ap- "pointed in case of a bishop's infir- "mity to superintend his *jurisdiction* "*and temporalties*, neither of which "was within the interference of the "former. See fully on this subject "in 1 Gibs. Cod. 1st edit. 155."— Co. Litt. by Harg. 94 a, note (3).

(n) Cowel's Interp. tit. Option.

(o) These options become the private patronage of the archbishop, and upon his death are transmitted to his personal representatives; or the archbishop may direct, by his will, whom, upon a vacancy, his executor shall present;—which direction, according to a decision in the House of Lords, his executor is compellable to observe. (1 Burn's Eccl. Law, 226.) If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so likewise if a bishop dies after an option becomes vacant, and before the archbishop or his representatives has presented, and the clerk is instituted, the crown *pro hâc vice* will be entitled to present to that dignity or benefice; (Potter *v.* Chapman, Amb. 101;) for the grant of the option by the bishop to the archbishop has no efficacy beyond the life of the bishop. (Christian's Blackstone, vol. i. p. 381.)

(p) Sherlock, Of Options, 1.

[the papal claim itself, (like most others of that encroaching see), was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces;* whereby the emperor exercises, and hath immemorially exercised (*q*), a right of naming to the first prebend that becomes vacant after his accession in every church of the empire (*r*). A right that was also exercised by the crown of England in the reign of Edward the first (*s*); and which probably gave rise to the royal *corodies;*] viz. the king's right (now fallen into disuse) of sending one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice (*t*). [It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom (*u*). And he hath also by the statute 25 Hen. VIII. c. 21 (*x*), the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time], or his giving dispensation [to hold two livings, and the like (*y*); and on this also is founded the right he exercises of conferring degrees,] called Lambeth degrees (*z*), [in prejudice

(*q*) Goldast. Constit. Imper. tom. 3, p. 406.

(*r*) Dufresne, v. 806; Mod. Univ. Hist. xxix. 5.

(*s*) Brev. 11 Edw. 1; 3 Pryn. 1264.

(*t*) 1 Bl. Com. 283. There were other species of corodies. Vide sup. vol. I. p. 648, n. (*h*).

(*u*) It is said that the archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. (1 Burn's Eccl. Law, 178.)

(*x*) Et vide 28 Hen. 8, c. 16. As to dispensation, see Colt and Glover v. Bishop of Lichfield and Coventry, Hob. 147.

(*y*) The power of the archbishop of Canterbury to grant special licences to marry, is now recognized by 4 Geo. 4, c. 76, s. 20 (vide sup. vol. II. p. 258); and his power to grant dispensations to hold two livings, by 1 & 2 Vict. c. 106, s. 6.

(*z*) Although the archbishop can confer all the degrees which are taken in the universities of Oxford and Cambridge, yet the graduates of these universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a "Lambeth" degree. (Christian's Blackstone, vol. i. p. 381.)

[of the universities (*a*).] In unaccustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council (*b*).

A bishop is the chief of the clergy within a diocese (*c*); but is subordinate to the archbishop of the province, to whom he is sworn to pay due obedience (*d*). His dignity is usually called a see (*sedes*), and his church a cathedral (*e*). Among the principal powers which he exercises are those of ordaining priests and deacons (*f*), consecrating churches, and [inspecting the manners of the people and clergy (*g*);] for which purpose [he may *visit* at pleasure every part of his diocese.] He is also an ecclesiastical judge (*h*): but [his chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesi-

(*a*) See the Bishop of Chester's case, Oxon. 1721.

(*b*) 25 Hen. 8, c. 21, s. 5.

(*c*) As to dioceses, vide sup. vol. I. p. 115.

(*d*) See preamble to 26 Geo. 3, c. 84. A clergyman is said to owe "canonical obedience" to the bishop who ordained him, to the bishop in whose diocese he is beneficed, and also to the metropolitan of such bishop. 4 Bl. Com. 203; 1 Hale, P. C. 381.

(*e*) As to the government and arrangement of cathedrals and collegiate churches, see 6 Ann. c. 21; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39. We may remark here, that a *collegiate church* is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., independently of any cathedral. The Report of the Cathedral Commission (vide post, p. 113) divides cathedrals and collegiate churches into four classes. The first class consists of thirteen, being the *cathedrals of the old foundation*, or Ecclesiæ Cathedrales Canonicorum Secularium. The second class consists of *eight conventual cathedrals, constituted with deans and chapters* by Hen. 8. The third class contains the *five cathedrals founded together, with new bishoprics*, by Hen. 8. The fourth class are the new cathedrals of Ripon and Manchester.

(*f*) See 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 15 & 16 Vict. c 52, s. 2, as to the ordination of priests or deacons for or in the colonies.

(*g*) See Re Dean of York, 2 Ad. & El. N. S. 1.

(*h*) As to the jurisdiction of the bishop as an ecclesiastical judge, vide sup. Introd. p. 67, bk. II. pt. II. c. VII.; et post, c. II., bk. V. c. V., c. XIII. As to the local limits of the jurisdiction of the bishop, as affected by the new arrangement of dioceses in pursuance of the recommendations of the ecclesiastical commissioners, see 10 & 11 Vict. c. 98; (continued by 20 Vict. c. 10.) See also Powell v. Hibbert, 15 Q. B. 129.

[astical law (*i*).] In case of complaint, however, against a clerk in holy orders, for any ecclesiastical offence under the Church Discipline Act, 3 & 4 Vict. c. 86, the bishop (*k*), (if after a preliminary inquiry, before commissioners, there appears sufficient ground for proceeding farther,) is to hold a court to hear the cause, assisted by three assessors:—of whom the dean of his cathedral, or one of his archdeacons, or his chancellor, must be one; and a serjeant at law, or an advocate who has practised five years in the court of the archbishop of the province, or a barrister of seven years' standing, another. The bishop may either determine the cause himself or may send it to the court of appeal for the province, there to be determined. In either case an appeal lies ultimately to the queen in council (*l*). [It is also the business of a bishop to institute, and to direct induction to, all ecclesiastical livings in his diocese,] and to license curates, and regulate their salaries (*m*).

[Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation (*n*). All resignations must be made to some superior (*o*). Therefore a bishop must resign to

(*i*) By 37 Hen. 8. c. 17, it is declared that the chancellor of a diocese may be a layman, married or single, provided he be doctor of the civil law lawfully create and made in some university. By the canons of 1603, he must be either a bachelor of law (at the least), or a master of arts. See Godolph. Ab. 82.

(*k*) In case the bishop is the patron of the preferment held by the clerk proceeded against, the *archbishop* acts. See Queen *v.* Archbishop of Canterbury, 23 L. J., Q. B. 347; Ex parte Denison, 4 Ell. & Bl. 292.

(*l*) Where the bishop has himself given judgment, there is an appeal, in the first instance, to the court of appeal for the province. (3 & 4 Vict. c. 86, s. 15.)

(*m*) 1 & 2 Vict. c. 106, s. 77; vide post, p. 37. See also 3 & 4 Vict. c. 33, authorizing the bishops of England or Ireland, to permit clergy of the Protestant episcopal Church in Scotland, or of the United States, to officiate in their respective dioceses.

(*n*) See 19 & 20 Vict. c. 115, "An "Act to provide for the Retirement "of the present Bishops of London "and Durham." By 6 & 7 Vict. c. 62, provisions are made for the performance of the episcopal functions in the case of the *incapacity* of any archbishop or bishop.

(*o*) Gibs. Cod. 822.

[his metropolitan; but the archbishop can resign to none but the king himself.]

The claims of the crown on archbishoprics and bishoprics in respect of the custody of the temporalties, and in respect of the first fruits and tenths of all spiritual preferments, including archbishoprics and bishoprics, have been already noticed in a former part of the work (*p*). They need not, therefore, be again discussed in this place. We may mention however here, that, when any spiritual person is made a bishop, all the preferments of which he was before possessed become in general, upon his consecration, void; and the sovereign may present to them by his prerogative royal (*q*).

II. [A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*r*). When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly (*s*) been mentioned), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean (*t*).]

(*p*) Vide sup. vol. II. p. 537.

(*q*) 1 Bl. Com. 383. See Basset *v.* Gee, Cro. Eliz. 790; Att.-Gen. *v.* Bishop of London, 4 Mod. 210; Grocers' Company *v.* Archbishop of Canterbury, 2 W. Bl. 770. It is laid down also by Sir E. Coke, 2 Inst. 491, that on the death of every prelate in England, the crown is entitled to six things, viz. the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds. (2 Bl. Com. 426.) The right to these things is considered by Blackstone as in the nature of a *mortuary* (as to which, vide Index *in tit.*); but Lord Coke says it was a *fine* to the crown for empowering the bishops to grant probates, &c. (Vide Mirehouse *v.* Rennell, 8 Bing. 497.)

(*r*) Dean and Chapter of Norwich's case, 3 Rep. 75; Co. Litt. 103, 300.

(*s*) Vide sup. vol. I. p. 117.

(*t*) This, says Blackstone (vol. I. p. 382), was probably because he was at first appointed to superintend *ten* canons or prebendaries.

The chapter, who, as distinct from the dean, consist of certain dignitaries called canons (*u*), [are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other (*y*).] And the antient deans were formerly elected by the chapter, by *congé d'élire* from the crown, and letters missive of recommendation, in the same manner as bishops; but in the modern deaneries, viz. those that were founded by Henry the eighth out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by letters-patent from the crown (*z*). And now this is the course also with respect to the antient deaneries; it being provided by 3 & 4 Vict. c. 113, that every such deanery (except in Wales) shall thenceforth be in the direct patronage of her Majesty; who may, on the vacancy thereof, appoint by letters-patent a spiritual person to be dean (*a*). And by the same Act it is further provided, that no person shall hereafter be capable of receiving the appointment of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders, (except in the case of a canonry annexed to any professorship, headship, or other office in any university (*b*)); that the dean shall reside for at least eight months in the year (*c*); that the term of a canon's residence shall be at least three months in the year (*d*); that the right of appointing a regulated number of *minor* canons, with salaries, shall in future be in all cases vested in the respective chapters (*e*); and that *honorary* canons (without emolument) shall be established in every cathedral church in which there are not already founded any non-residentiary

(*u*) By 3 & 4 Vict. c. 113, s. 1, all the members of Chapters, except the dean, in every cathedral and collegiate church in England, shall be styled canons.

(*y*) See 3 & 4 Vict. c. 113, ss. 24, 26; 4 & 5 Vict. c. 39, as to the right of appointment to certain canonries.

(*z*) See the learned note by Mr. Hargrave, Co. Litt. 95; 1 Bl. Com. 383.

(*a*) 3 & 4 Vict. c. 113, s. 24.

(*b*) Sect. 27.

(*c*) Sect. 3.

(*d*) Ibid.

(*e*) Sect. 45.

prebends, dignitaries, or officers, and shall be in the gift of the archbishops and bishops respectively (*f*).

[The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary (*g*), and immediate superior; and has, generally speaking, the power of *visiting* them (*h*); and correcting their excesses and enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28,] (which enabled him to grant leases not exceeding twenty-one years or three lives, on his sole authority,) his grant or lease would not have bound his successors, unless confirmed by the dean and chapter (*i*).

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the king or the bishop (*k*).

III. [An *archdeacon* (*l*) hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his (*m*). He therefore *visits* the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance (*n*).] As a general rule (but subject to exception in the case of particular archdeaconries), the jurisdiction of the arch-

(*f*) 3 & 4 Vict. c. 113, s. 23.

(*g*) As to the ordinary, vide sup. vol. II. p. 195.

(*h*) See Re Dean of York, 2 Q. B. 1.

(*i*) Co. Litt. 44 a, 103 a.

(*k*) Grendon *v.* Bishop of Lincoln, Plowd. 498.

(*l*) As to the ecclesiastical division of dioceses into archdeaconries, of archdeaconries into rural deaneries, and of rural deaneries into parishes, vide sup. vol. I. p. 116.

(*m*) 1 Burn's Eccl. Law, 68, 69.

(*n*) By 6 & 7 Will. 4, c. 77, s. 19, it is provided that all archdeacons throughout England and Wales should have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding. And see 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; and 4 & 5 Vict. c. 39, for provisions as to the endowment and arrangement of archdeaconries.

deacon and the bishop are *concurrent*, so that a suit may be commenced in the court of either (*o*). An archdeaconry may become void by death, deprivation or resignation.

IV. [The *rural deans* are very antient officers of the church (*p*), but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry (*q*). They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority (*r*).

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the *parsons* and *vicars* of churches: in treating of whom, we shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

1. A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church (*s*). He is called parson, *persona*, because by his person the church, which is an invisible body, is represented.] He is also [sometimes called the *rector*, or governor of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use,) is the most legal, most beneficial, and most honourable title that

(*o*) Rogers's Eccl. Law, 60. See farther as to the archdeacon's court, post, bk. v. c. v.

(*p*) Kennett, Par. Antiq. 633. Dansey, Horæ Decanicæ Rurales.

(*q*) See 6 & 7 Will. 4, c. 77, s. 1, and 3 & 4 Vict. c. 113, s. 32. In the Report on Public Religious Worship, by the Registrar-General, under Census of 1851, it is said there were then 463 rural deaneries in England and Wales (p. xxxvi).

(*r*) Gibs. Cod. 972, 1550.

(*s*) As to parishes and parochial churches, vide sup. vol. I. p. 116.

[a parish priest can enjoy; because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere.* A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated;* that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman (*u*).] It will be proper, however, to examine more closely the doctrine of appropriation, with which the law of *vicars* is closely connected.

[This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such

(*u*) The subject of appropriation is fully explained in Burn's Eccl. L. in tit.; Wats. C. L. 191; Grendon *v.* Bishop of Lincoln, Plowd. 493; Duke of Portland *v.* Bingham, 1 Hagg. Consist. Rep. 162.

[appropriation effectually, the king's licence, and consent of the bishop, must first be obtained; because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied: because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church (*x*). When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons (*y*).]

Appropriators were thus in their origin always persons spiritual, being bishops, prebendaries, monasteries, and other religious houses, [nay, even nunneries, and certain military orders; all of which were spiritual corporations.] But the case is now different; for by 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, [amounting to more than one-third of all the parishes in England (*z*),] were given to the king in as ample a manner as the bishops, &c. formerly held the same at the time of their dissolution; a proceeding which, [though perhaps scarcely defensible, was not without example;] for the same thing was done in former reigns with respect to the alien priories, (that is, such as

(*x*) Grendon *v.* Bishop of Lincoln, Plowd. 496 - 500.

(*y*) Wright *v.* Gerard, Hob. 307.

(*z*) Seld. Review of Tithes, c. 9; Spelm. Apology, 35.

were filled by foreigners only (*a*)); and many of the appropriations so vested in the crown by the effect of these several dissolutions, being afterwards from time to time granted out by the crown to subjects, are now in the hands of lay persons,—who are usually styled, by way of distinction, *lay impropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders (*b*).

Appropriations of either class are capable, it is held, of being severed, so that the church may become disappropriate; and that in [two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities (*c*).] Secondly, [if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law: because the perpetuity of person is gone, which is necessary to support the appropriation.]

In all appropriations there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty or *cure of souls* (as it is termed), belongs, in the same manner, as in parsonages not appropriated (or rectories), to the rector: and to whom, on the other hand, a certain portion of the tithes or other emoluments of the church, by way of exception out of those enjoyed by the appropriator, is assigned. The origin of these vicars (*d*) is as follows:

[The appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those

(*a*) 2 Inst. 584.

(*b*) Vide Burn's Eccl. Law, vol. i. 66; Christian's Blackstone, vol. i. 388, (n.); Spelm. Tithes, c. 29.

(*c*) Co. Litt. 46.

(*d*) As to vicarages, see 40 Edw. 3, pl. 27; Britton *v.* Wade, Cro. Jac. 516; Spelm. Tithes, 153; Bird *v.* Relph, 2 Ad. & El. 780; Rogers's Eccl. L. 890.

[parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar* (*e*). His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere* (*f*). But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and, accordingly, it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches the diocesan bishop shall ordain, (in proportion to the value of the church,) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this Act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed at the discretion of the ordinary, for these three express purposes,—to do divine service, to inform the people, and to keep hospitality (*g*). The endowments in conse-

(*e*) See Grendon *v.* Bishop of Lincoln, Plowd. 493; Seld c. 11, s. 1. It would seem that such ministers existed as long ago as the reign of Henry the second, but they are said to have been then few in number. (Bird *v.* Relph, 2 Ad. & El. 780.)

(*f*) Seld. Tith. c. 11, 1.

(*g*) From this Act may be dated the origin of the *present* vicarages; for before this time the vicar was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was

[quence of these statutes have usually been by a portion of the glebe or lands belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect:] the greater part being still reserved to their own use. [But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.]

Such is the history of the distinction between rectors and vicars, the law on which subject may be summarily stated thus. Of parochial churches some have been appropriated, others have not: of the non-appropriated (called *rectories*) there is no vicar, but a rector only, who is of necessity a spiritual person, and has the cure of souls in the parish (*h*), with the exclusive title to all the emoluments: of the appropriated, there is generally, besides the rector or appropriator, a vicar: and in churches so circumstanced (termed *vicarages*), the appropriator is either ecclesiastical or lay, a corporation aggregate or sole, as the case may be, but has never (as appropriator) the cure of souls within the parish; while the vicar, on the other hand, is always an individual and spiritual person, and is charged with the cure of souls. And as to the emoluments in vicarages, they belong in part to the appropriator, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that, in non-appropriated churches, the rector,—in those which are appropriated, the vicar,—is

generally one of their own body, that is, one of the *regular* clergy; for the monks, who lived *secundum regulas* of their respective houses or societies, were denominated *regular* clergy, in contradistinction to the parochial clergy, who performed their ministry in the world, *in seculo*, and who from thence were called *secular* clergy. (Christian's Blackstone.)

(*h*) By 2 & 3 Vict. c. 30, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an apportionment of the spiritual services.

seised for his life only, the fee being in abeyance (*i*); but the appropriator may be seised in fee, or of a less estate, according to the circumstances of his title.

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of Hen. IV. c. 12 (*k*), that no vicar has ever been endowed. Such churches however usually possess a permanent minister in holy orders, of the same general description,—who, under the denomination of *perpetual curate* (*l*), is charged with the cure of souls, and entitled to emolument for his services; and where there is no perpetual curate properly so called, the appropriator is bound from time to time to provide some person in holy orders to perform the same duty, and to pay him a proper remuneration for his services (*m*).

It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice, having cure of souls, sometimes obtained permission from superior authority to appoint a vicar to officiate under him; so that, by this means, two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a *sinecure rector*, or rector without cure of souls (*n*). But by a late statute, 3 & 4 Vict. c. 113, it is now provided that all ecclesiastical rectories without cure of souls in the

(*i*) Vide sup. vol. I. p. 237.

(*k*) 1 Bl. Com. 394; 1 Burn's Eccl. L. 427; Wats. C. L. 172.

(*l*) A perpetual curate is liable to his successor, for dilapidations (Mason *v.* Lambert, 12 Q. B. 795). And as to perpetual curates in general, see Doe *v.* Thomas, 9 A. & E. 556; Hine *v.* Reynolds, 2 Man. & Gr. 71; Doe *d.* Brammall *v.* Collinge, 7 C. B. 939; 1 Geo. 1, c. 10, ss. 4 and 21.

(*m*) See 1 & 2 Vict. c. 31; Hine *v.* Reynolds, ubi sup. and the authorities there cited. Also, Arthington *v.* Bishop of Chester, 1 H. Bl. 429.

(*n*) See 2 Burn's Eccl. L. 347; Christian's Blackstone, vol. i. p. 386, (n.); Rogers's Eccl. L. 890; Gibs. Cod. 753.

sole patronage of the crown, or of any ecclesiastical corporation aggregate or sole, and having a vicar endowed or a perpetual curate, shall, immediately upon the future vacancies thereof respectively, be suppressed; and that with respect to all such as are in the patronage of any other person, the patronage of them may be at any time sold to the body corporate of Ecclesiastical Commissioners (of whom we shall soon find occasion to say more), and upon the completion of such purchase the same shall respectively be suppressed (*o*); and the lands, tithes and endowments thereof shall be vested in the Ecclesiastical Commissioners (*p*), and may be afterwards annexed, when it shall appear expedient, to the vicarage or perpetual curacy; which shall be thereupon constituted a rectory with cure of souls (*q*). And moreover, that wherever any rectory theretofore deemed a rectory without cure of souls had been held, together with the vicarage dependent thereon, for the period of twenty years then last past, the same shall not be construed to be a rectory without cure of souls, within the meaning of that Act, but shall become permanently a rectory with cure of souls (*r*).

We have thus had occasion incidentally to notice three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies. And as to all these we may remark, that they are usually comprehended under the general term of *benefice* (*s*); a term indeed which, in its technical sense, extends not only to these, but also to ecclesiastical preferments to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*t*); but in popular acceptation it is almost

(*o*) 3 & 4 Vict. c. 113, s. 48.

(*p*) Sect. 54.

(*q*) Sect. 55.

(*r*) Ibid.

(*s*) As to the primary meaning of the word *benefice* (a term derived from the feudal law), vide sup. vol. I. p. 174.

(*t*) 3 Inst. 174.

invariably appropriated to rectories, vicarages, and the other parochial preferments above enumerated (*u*).

2. [The method of becoming a parson or a vicar is much the same (*x*). To both there are] in general [four requisites necessary: *holy orders*; *presentation*; *institution*; and *induction*.] The method of conferring *holy orders* has been already so far noticed as the purpose of these Commentaries required; we shall therefore only remark here, in reference to this qualification, that though, [by the common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage,] it was afterwards provided by 13 Eliz. c. 12, that no deacon under twenty-three years of age should be so admitted; and that a deacon, not ordained priest within one year after his induction, should be *ipso facto* deprived; and now, by statute 13 & 14 Car. II. c. 4, s. 14, it is enacted, that no person shall be capable of being admitted to any benefice unless he shall have been first ordained *priest* (*y*).

[Any clerk may be *presented* (*z*) to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall

(*u*) By 1 & 2 Vict. c. 106, s. 124, a distinction is accordingly made between *benefices* and such preferments as have either rank or public office connected with them,—that statute having adopted the two general terms of *benefices* and *cathedral preferments*; by the former of which it is to be understood to mean all parochial or district churches, and endowed chapels and chapelries; by the latter, all deaneries, archdeaconries, and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of a bishop. See also as to the term *benefice*, 5 & 6 Vict. c. 27, s. 15; c. 108, s. 31; and 13 & 14 Vict. c. 98, s. 3.

(*x*) Vide sup. p. 91.

(*y*) As to the ages at which a man may be ordained deacon or priest, vide sup. p. 2.

(*z*) A layman may also be presented; but he must take priest's orders before his admission. (1 Burn's E. L. 103.)

[find a more convenient place to treat] under our third division, relating to the benefices and endowments of the church (*a*); and shall for the present only remark, that [when a clerk is presented the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days (*b*). Or, 2. If the clerk be unfit (*c*): which unfitness is of several kinds. First, with regard to his person; as if he be a bastard (*d*), an outlaw, an excommunicate, an alien, under age, or the like (*e*). Next with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se:* but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like, it is not good cause of refusal (*f*). Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal (*g*),] at least if he be a layman, for in that case he is presumably unaware of the disability. But if the objection be a temporal one, the bishop is not bound to give such notice (*h*).

[If an action at law be brought by the patron against the

(*a*) Vide post, c. III.

(*b*) 2 Roll. Abr. 355.

(*c*) Glanv. l. 13, c. 20.

(*d*) Though this be classed in the books among the causes of refusal, yet such is the liberality of the present times, that no one need apprehend that his presentment would be impeded by the incontinence of his parents, or by any demerit but his own. (Christian's Blackstone, vol. i. p. 389, (n.).)

(*e*) 2 Roll. Abr. 356; 2 Inst. 632; stat. 3 Ric. 2, c. 3; 7 Ric. 2, c. 12.

(*f*) Specot's case, 5 Rep. 58.

(*g*) Bedinfield *v.* Archbishop of Canterbury, Dyer, 292 (*b*); Hele *v.* Bishop of Exeter, 2 Salk. 539; Albany *v.* Bishop of St. Asaph, Cro. Eliz. 119. When the avoidance is by the clerk's having been ordained under the proper age notice must be given; 44 Geo. 3, c. 43.

(*h*) 2 Inst. 632; 2 Burn, Ecc. L. 157; Hele *v.* Bishop of Exeter, ubi sup.

[bishop, for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted, (as, for instance, outlawry,) the judges of the superior courts of law must determine its validity, or whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines, shall decide its sufficiency (*i*). If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient (*k*): for the statute 9 Edw. II. st. 1, c. 13, is express, that the examination of the fitness of a person presented to a benefice, belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literaturâ*, the court shall write to the metropolitan to re-examine him, and certify his qualifications; which certificate of the archbishop is final (*l*).

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be *instituted* by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk (*m*).] [But when the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to a benefice. By institution or collation, the church is full, so that there can be

(*i*) 3 Inst. 632.

(*k*) Specot's case, ubi sup.; Hele v. Bishop of Exeter, 2 Salk. 539; 3 Lev. 313.

(*l*) 2 Inst. 632.

(*m*) A vicar was formerly bound, upon institution, to take an oath of perpetual residence. (1 Bl. Com. 390.) But this is now abolished. See 1 & 2 Vict. c. 106, s. 61.

[no fresh presentation till another vacancy,—at least in the case of a common patron; but the church is not full against the crown, till induction: nay, even if a clerk is instituted upon the crown's presentation, the crown may revoke it before induction, and present another clerk (*n*). Upon institution, also, the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession; and is called in law *persona impersonata*, or parson imparsonee (*o*).] The title, however, of any person admitted to a rectory or other benefice will be afterwards divested, unless within two months after actual possession, he publicly read in the church of the benefice, upon some Lord's day, and at the appointed times, the morning and evening service according to the Book of Common Prayer; and afterwards publicly, before the congregation, declare his assent to such book (*p*); and also publicly read the Thirty-nine Articles in the same church in the time of common prayer, with declaration of his assent thereto (*q*); and moreover, within three months after his admission, read upon some Lord's day, in the same church, in the presence of the congregation, in the time of divine service, a declaration, by him subscribed before the ordinary,

(*n*) Co. Litt. 344.

(*o*) Ibid. 300.

(*p*) 13 & 14 Car. 2, c. 4, s. 6.

(*q*) 13 Eliz. c. 12, s. 3.

of conformity to the Liturgy,—together with the certificate of the ordinary of its having been so subscribed (*r*).

In addition to the methods which have been mentioned, of *presentation* and *collation*, it is to be observed, that a clerk may also acquire certain benefices, by mere *donation*, that is, by deed of gift alone, without presentation, institution, or induction (*s*). And nearly similar to this, is the manner of becoming a perpetual curate; for this requires no presentation, institution, or induction (*t*). It differs, however, from a pure donative, in this, that the perpetual curate cannot legally officiate until he obtains the bishop's licence (*u*). As to these perpetual curacies, their origin has been already explained. With respect to *donatives* they are created whenever [the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*x*). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop, not being established more early than the time of Archbishop Becket, in the reign of Henry the second (*y*). And therefore though Pope Alexander the third (*z*), in a letter to à Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island: and in proof of it they allege

(*r*) 13 & 14 Car. 2, c. 4, s. 8—12; 1 W. & M. sess. 1, c. 8, s. 11.

(*s*) Co. Litt. 344. As to donatives, see Wats. C. L. 170; 2 Bl. Com. 23, note by Christian; Repington *v.* Governor of Tamworth School, 2 Wils. 150; Rennell *v.* Bishop of Lincoln, 7. B. & C. 113; S. C. in error, 8 Bing. 490; Queen *v.* Foley, 2 C. B. 664.

(*t*) Wats. C. L. 172.

(*u*) R. *v.* Bishop of Chester, 1 T. R. 403; Wats. C. L. 172.

(*x*) Co. Litt. 344; 2 Bl. Com. 23.

(*y*) Seld. Tith. c. 12, s. 2.

(*z*) Decretal. l. 3, t. 7, c. 3.

[a letter from the English nobility to the Pope in the reign of Henry the third, recorded by Matthew Paris (*a*), which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never be donative any more (*b*). For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever: and will therefore reduce it to the standard of other ecclesiastical livings.]

3. [The rights of a parson or vicar (*c*), in his tithes and ecclesiastical dues, fall more properly under] our third division, as to church benefices and endowments; [and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest it will be sufficient

(*a*) A.D. 1239.

(*b*) Co. Litt. 344; Farchild *v.* Gayre, Cro. Jac. 63.

(*c*) Vide sup. p. 10.

[to refer to such authors as have compiled treatises expressly upon this subject (*d*). We shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an *incumbent*.]

By statute 1 & 2 Vict. c. 106 (repealing the former acts as to residence (*e*)), every spiritual person holding a benefice, a term which, as used in this act (*f*), comprises all parochial churches, perpetual curacies, chapels, and church or chapel districts whatever, if with cure of souls (*g*),—shall keep residence thereon, and in the house of residence (if any) belonging thereto; and if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year, he shall forfeit, unless resident at some other of his benefices, a certain portion, (increasing with the length of absence,) of the annual value of his benefice (*h*). But this is subject to various exceptions and modifications, of which the principal are as follows: 1st. No heads of houses in the university of Cambridge or Oxford, or any warden of the university of Durham, or head master of Eton, Winchester, or Westminster school, shall be liable to the penalties of non-residence (*i*). 2ndly. Deans and archdeacons,—and various public professors, readers, preachers and chaplains,—the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's, and of King's College, London, and also (provided they are not absent from their benefices more than five months in the year), the fellows of Eton and Winchester—and all canons, minor canons, priest vicars, and vicars choral—are entitled

(*d*) These are very numerous: but there are few which can be relied on with confidence. Among those which can, are Bishop Gibson's Codex, Dr. Burn's Ecclesiastical Law, and the earlier editions of the Clergyman's Law, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

(*e*) See 21 Hen. 8, c. 13; 57 Geo. 3, c. 99.

(*f*) 1 & 2 Vict. c. 106, s. 124.

(*g*) Ibid. As to the meaning of *benefice*, in general, vide sup. p. 26.

(*h*) 1 & 2 Vict. c. 106, s. 32. See Rackham *v.* Bluck, 9 Q. B. 691.

(*i*) 1 & 2 Vict. c. 106, s. 37.

to count the time of their official residences or duties, as if it had been passed upon their benefices (*k*). 3rdly. If there be no house, or no fit house of residence, the bishop may license the holder of the benefice, from time to time, to reside in some fit house elsewhere, provided it be within a certain specified distance from his church or chapel; and the same shall thereupon become a legal house of residence for all purposes. 4thly. If there be no house, or no fit house of residence, and such certificate be also produced as by the Act provided, that no house convenient for the residence of the holder of the benefice can be obtained within the parish, or within the specified distance from the church or chapel; or if the residence of the holder of any benefice within those limits, is prevented by any incapacity of mind or body, or by the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise); the bishop may grant a licence of non-residence: and in case of his refusal, there is an appeal to the archbishop of the province (*l*). 5thly. If the holder of any benefice happen to occupy in the same parish, any mansion or messuage whereof he is the owner, the bishop may grant him a licence to reside therein; and, if he refuses, remedy may be had by the same course of appeal (*m*). 6thly. The bishop is empowered, in any other case besides those enumerated, to grant, if he shall think it expedient, a licence to reside out of the limits of the benefice;—but in a case of this description the special circumstances and reasons must be transmitted to the archbishop of the province, without whose allowance the licence will be ineffectual (*n*).

It is farther provided by this Act, that annual returns of residents and non-residents shall be made to her majesty in council (*o*); and that in case of non-residence, the bishop, instead of proceeding to enforce the penalties, may issue

(*k*) 1 & 2 Vict. c. 106, ss. 38, 39.
(*l*) Sect. 43.
(*m*) Ibid.
(*n*) 1 & 2 Vict. c. 106, s. 44.
(*o*) Sects. 51, 53.

a monition against the offender, to be followed up, where requisite, by an order to reside; and in case of non-compliance with such order, may sequester the profits of the benefice, and apply them to the purposes in the Act specified (*p*). In case also of long continued or repeated sequestration, the benefice is to become void, and a new presentation may be made as if the former holder were dead (*q*).

For the more effectual promotion of this important duty of residence, among the parochial clergy, there are also contained in this Act, (as in several others,) a variety of provisions for repairing the houses in which they are to reside, and for building or purchasing new ones, and for raising money for these purposes by mortgage of the benefices (*r*).

4. [We have seen that there is but one way whereby one may become a parson or vicar,] (viz. by the gift of a patron, [followed in general by the admission of the ordinary); but there are many ways by which one may cease to be so. 1. By death. 2. By cession, or taking another benefice.] For by the statute 1 & 2 Vict. c. 106, before mentioned (*s*)—repealing the former statute against pluralities (*t*)—and by 13 & 14 Vict. c. 98, it is enacted, that in future (and subject to exception in the case of rights already vested), no spiritual person shall take and hold together any two benefices,—except in the case of two

(*p*) Sect. 54. As to the proceedings to sequestration for non-residence, see Sharpe *v.* Bluck, 10 Q. B. 280; Ex parte Bartlett, 12 Q. B. 488; Re Bartlett, 3 Exch. 28; Daniel *v.* Morton, 20 L. J. (Q. B.) 98; Bonaker *v.* Evans, 16 Q B. 162; Bartlett *v.* Kirwood, 2 Ell. & Bl. 771.

(*q*) Sect. 58.

(*r*) For such provisions, see 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 56 Geo. 3, c. 152; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 1 & 2 Vict. cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Vict. c. 113, s. 59; 4 & 5 Vict. c. 39, s. 18; 5 & 6 Vict. c. 26 (repealing 2 & 3 Vict. c. 18); 19 & 20 Vict. c. 104, s. 27.

(*s*) As to the law of cession before this act, see Alston *v.* Atlay, 7 A. & E. 289; King *v.* Alston, 12 Q. B. 985.

(*t*) 21 Hen. 8, c. 13.

benefices, the churches of which are within three miles of one another by the nearest road, and the annual value of one of which, does not exceed 100*l.* (*u*): that no spiritual person holding a benefice with cure of souls, with a population of more than 3000, shall take to hold therewith, any other having a population of more than 500; nor *vice versâ:* that no spiritual person holding more than one benefice with cure of souls, shall take to hold therewith any other, or any cathedral preferment (*x*): and that upon every admission to a new benefice or preferment contrary to the Acts, every benefice previously held shall be void *ipso facto* (*y*):—which prohibitions, however, in respect of population and yearly value, are subject to a provision enabling the Archbishop of Canterbury to grant a dispensation therefrom in certain cases, on recommendation of the bishop of the diocese (*z*). 3. [By consecration; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated (*a*). But a method was formerly in

(*u*) By 18 & 19 Vict. c. 127, s. 1, however, any two or more benefices, or spiritual sinecure rectories or vicarages contiguous to each other, may, under the superintendence of the Church building commissioners (whose powers are now transferred to the Ecclesiastical commissioners,) be *united* under the provisions of that Act, on the report of the bishop, founded on a representation made to him by the major part of the respective inhabitants of the parishes in which such benefices are situated, that such union may take place with advantage to the interests of religion; and this without regard to aggregate population or yearly value. In the Acts mentioned in the text are also to be found provisions in reference to an union of the same description; but they are subject, under the first of these Acts, to the condition that the aggregate population shall not exceed 1,500 persons, nor the aggregate yearly value 500*l.*, and, under the last, to the same condition, so far as regards the population. The 18 & 19 Vict. c. 127, is limited in its operation to five years.

(*x*) 1 & 2 Vict. c. 106, s. 2.

(*y*) Sect. 11; 13 & 14 Vict. c. 98, s. 7.

(*z*) 1 & 2 Vict. c. 106, ss. 5, 6. See also provisions against various cases of plurality, as regards *persons holding cathedral preferments,* 1 & 2 Vict. c. 106, s. 11; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98, s. 11; *deans of cathedrals,* 13 & 14 Vict. c. 94, s. 19; *heads of colleges,* 13 & 14 Vict. c. 98, ss. 5, 6.

(*a*) Vide sup. p. 16.

[use, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This might be temporary for one, two or three years, or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*;] and used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenue. And there was [also a *commenda recipere*, which is, to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this was the same to him as institution and induction are to another clerk (*b*).] But now, by 6 & 7 Will. IV. c. 77, s. 18 (*c*), no ecclesiastical dignity, office or benefice shall be held in *commendam* by any bishop, unless he shall have held the same when the act passed; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all purposes. 4. [By resignation; but this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made (*d*). 5. By deprivation; either, first, by sentence declaratory] in the proper court (*e*), [for fit and sufficient causes,—such as attainder of treason or felony (*f*), or conviction of other infamous crime in the king's courts; or conviction of heresy (*g*), infidelity (*h*), gross immorality, and the like;] or of farming or trading contrary to law, after two former convictions for the same offence (*i*): [or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some mal-

(*b*) Colt *v.* Bishop of Lichfield and Coventry, Hob. 144.

(*c*) See also as to Sodor and Man, 1 & 2 Vict. c. 30.

(*d*) Fane's case, Cro. Jac. 198.

(*e*) See the Church Dicipline Act, 3 & 4 Vict. c. 86; Re Dean of York, 2 Q. B. 1; Ex parte Denison, 4 Ell. & Bl. 292.

(*f*) Bishop of Chichester *v.* Webb, Dyer, 108; Jenk. 210.

(*g*) See Ex parte Denison, ubi sup.

(*h*) Fitz. Abr. tit. Trial, 54.

(*i*) 1 & 2 Vict. c. 106, s. 31.

[feasance or crime; as, for simony (*j*); for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common-prayer (*k*); for neglecting to read the liturgy and articles in the church,] and to declare assent to the same, within two months after induction (*l*); or [for using any other form of prayer than the liturgy of the Church of England (*m*);] or for continued neglect, after order from the bishop followed by sequestration, to reside on the benefice (*n*); in all which and similar cases (*o*) [the benefice is *ipso facto* void, without any formal sentence of deprivation.]

VI. [A *curate* is the lowest degree in the church:] being an officiating temporary minister regularly employed by the spiritual rector or vicar, either to serve in his absence, or as his assistant, as the case may be (*p*). All curates ought, before they enter on their duties, to be *licensed* (*q*) by the bishop of the diocese; and the law, on the other hand, has made several provisions for their proper maintenance. For by 28 Henry VIII. c. 11 (*r*), [such as serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable out of the profits of the vacancy; or, if that be not sufficient, by the successor, within fourteen days after he takes possession.] And by a modern act of parliament, 1 & 2 Vict. c. 106, (which we have already had occasion to notice under the heads of *residence* and *pluralities*,) numerous provisions are made as to the *appointment and payment of curates* during an

(*j*) Stat. 31 Eliz. c. 6; 12 Ann. c. 12.

(*k*) Stat. 1 Eliz. cc. 1, 2; 13 Eliz. c. 12.

(*l*) Ibid. s. 3; 13 & 14 Car. 2, c. 4, s. 6; vide sup. p. 30.

(*m*) Stat. 1 Eliz. c. 2.

(*n*) 1 & 2 Vict. c. 106, s. 58. As to the order of the bishop to reside, and the sequestration thereon, vide sup. p. 35.

(*o*) See Green's case, 6 Rep. 29, 30.

(*p*) Burn's Ecc. Law, by Tyrw. vol. ii. p. 54, (a). As to the common law right of the rector to appoint his curate, see Arnold *v.* Bishop of Bath, 5 Bing. 316. As to *lecturers* and *preachers*, see 7 & 8 Vict. c. 59; 18 & 19 Vict. c. 127, s. 12.

(*q*) Burn's Ecc. Law, by Tyrw. vol. i. p. 61; Wats. C. L. 147, 207, 335.

(*r*) 28 Hen. 8, c. 11, ss. 5, 10.

incumbency, among which are the following:—that, in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper curate with a stipend (*s*); and shall also in some instances, where the incumbent fails to reside, require the curate to reside (*t*);—that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where the benefice is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*u*);—that the stipend to be allowed to the curate, in every case where he is appointed by the bishop, under the provisions of the act, shall be adjusted in proportion to the value and population of the benefice; and shall not in any case fall short of 80*l* per annum, or the annual value of the benefice, if it be under that amount (*x*): and that in all cases of dispute between the incumbent and the curate touching stipend, or the non-payment of stipend, the bishop, on complaint to him made, may summarily determine the same without appeal, and enforce his sentence by monition and sequestration (*y*).

[Thus much of the clergy, properly so called. There are also certain inferior officers] connected with the church [of whom the secular law takes notice; and that, principally, to assist the ecclesiastical jurisdiction where it is deficient in powers. On which officers we shall make a few cursory remarks.

(*s*) 1 & 2 Vict. c. 106, s. 85. The former statutes on the subject of the stipend of the curate, during the incumbency, are all repealed. See 57 Geo. 3, c. 99, which act is itself repealed by 1 & 2 Vict. c. 106, except so far as it repeals former statutes.

(*t*) 1 & 2 Vict. c. 106, s. 76.

(*u*) Sects. 77, 78.

(*x*) Sect. 85.

(*y*) Sect. 83. See Daniel *v.* Morton, 16 Q. B. 198.

[VII. *Churchwardens* (z) are the guardians or keepers of the church, and representatives of the body of the parish (a);] but though in some sort ecclesiastical officers, they are always lay persons (b). [They are sometimes appointed by the minister, sometimes by the parish,] in vestry assembled (c), [sometimes by both together, as custom directs (d).] But where there is no custom, it is said the election must be according to the canons (e); which direct (f) that they shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, then the minister is to choose one, and the parishioners another. They are to be chosen yearly in Easter week, and are generally two in number; are obliged, when chosen, to serve (g); and are sworn to execute their office faithfully (h). [They are taken, in favour of the church, to be for some purposes a kind of corporation, at the common law; that is, they are enabled

(z) Bac. Abr. Churchwardens; Burn's Ecc. Law, eodem tit.; Ex parte Winfield, 3 Ad. & El. 614; R. v. Archdeacon of Middlesex, ibid. 615; Ex parte Duffield, ibid. 617; R. v. Marsh, 5 Ad. & El. 468.

(a) In Sweden they have similar officers, whom they call *kiorckiowariandes*. Stiernhook, l. 3, c. 7.

(b) Per Hale, Hard. 379; 1 Rol. Ab. 653; 2 Rol. Rep. 107.

(c) As to vestries, vide sup. vol. I. p. 120.

(d) As to the manner of their election, see Campbell v. Maund, 5 Ad. & El. 865; R. v. Rector of Lambeth, 8 Ad. & El. 356. The manner of electing them for churches built under the Church Building Acts (as to which Acts, vide post, p. 113), is fixed by 58 Geo. 3, c. 45, s. 73; 1 & 2 Will. 4, c. 38, ss. 16, 25, and 8 & 9 Vict. c. 70, ss. 7, 8. With respect to the churchwardens under the New Parishes Acts (as to which Acts, vide post, p. 119), see 6 & 7 Vict. c. 37, s. 17; 19 & 20 Vict. c. 104, s. 28.

(e) Catten v. Barwick, Str. 145. See Bac. Abr. Churchwardens, A., and the authorities there cited in the margin.

(f) Canon 89.

(g) Several classes of persons, however, are either ineligible, or are exempted from the office, viz., peers of the realm, members of parliament, clergymen, Roman Catholic clergy, dissenting ministers, barristers, attorneys, clerks in court, physicians, surgeons, apothecaries, aldermen, dissenting teachers; and persons living out of the parish, unless they occupy a house of trade there. Steer's Parish Law, p. 84.

(h) Canon 88. As to granting a mandamus to swear them in, see Ex parte Winfield, 3 Ad. & El. 614, 615.

[by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*i*):] and one of their chief duties, accordingly, is the care and management of the goods belonging to the church, such as the organ, bells, bible and parish books (*j*). But as to the church and church yard [they have no sort of interest therein; and if any damage be done thereto, the parson only, or vicar, shall have the action (*k*).] It is also part of their office, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice, during its vacancy; or while it is under sequestration for the debts of the incumbent (*l*). They are moreover required to see to the reparation of the church, and the making of the *church rates*, by which the expenses of it are to be defrayed: which rates are charged on all lands and houses in the parish; are levied on the occupiers; made by the parishioners at large, (that is, by the majority of those that are present at a vestry to be summoned for that purpose by the churchwardens (*m*)); and, when made, are recoverable (if the arrears do not exceed 10*l*. (*n*), and no question be raised as to the legal liability (*o*)), before two justices of the peace (*p*); otherwise, in the ecclesiastical court. Churchwardens are also to make such order rela-

(*i*) Vide 9 Geo. 1, c. 7, s. 4; et vide as to *parish lands*, 59 Geo. 3, c. 12, ss. 8, 17; 5 & 6 Will. 4, c. 69, s. 4; Smith *v*. Adkins, 8 Mee. & W. 362.

(*j*) Bac. Abr. Churchwardens, B.; Wats. C. L. 390; Addison *v*. Round, 4 Ad. & El. 799; Jackson *v*. Adams, 2 Bing. N. C. 402.

(*k*) 1 Bl. Com. 395. Churchwardens cannot set up monuments; Beckwith *v*. Harding, 1 B. & Ald. 508.

(*l*) Steer, P. L. 91.

(*m*) Burder *v*. Veley, 12 Ad. & El. 247. As to church rate, see also Craven *v*. Sanderson, 7 Ad. & El. 880; R. *v*. St. Margaret's, 2 Per. & D. 510; Gosling *v*. Veley, 7 Q. B. 409; 12 Q. B. 328; Queen *v*. Byron and others, 17 L. J. (M. C.), 134; Queen *v*. Abney, 3 Ell. & Bl. 779. As to *chapel* rate, see Ramsbottom *v*. Duckworth, 1 Exch. 506.

(*n*) In the case of a Quaker, this sum is extended by 53 Geo. 3, c. 127, s. 6, to 50*l*.

(*o*) As to this proviso, see Dale *v*. Pollard, 2 New Mag. Ca. (Q. B.), 169.

(*p*) 53 Geo. 3, c. 127; 5 & 6 Will. 4, c. 74; 4 & 5 Vict. c. 36; 12 & 13 Vict. c. 14, s. 9; R. *v*. St. Clement's, 12 Ad. & El. 177; Richards *v*. Dyke, 3 Q. B. 256; Queen *v*. Colling, 17 Q. B. 816.

tive to seats in the church and chancel, not appropriated to particular persons, as the ordinary (who has in general the sole power in this matter (*q*)) shall direct; and, in practice, the arrangements are usually made by the churchwardens, even without any special direction from the ordinary (*r*). It is incident also to their office to enforce proper and orderly behaviour during divine service, [to which end it has been held that churchwardens may justify the pulling off a man's hat] irreverently worn there, or the removal of the offender from the church (*s*); and besides these, there are a multitude of other parochial powers committed to their charge (*t*), which cannot be particularized without descending to inconvenient minuteness. Formerly, too, they were joined with the overseers in the care and maintenance of the poor; but this duty is now in general taken from them by the effect of 4 & 5 Will. IV. c. 76 (the act for amendment of the poor law), and of the regulations introduced, under its authority, by the Poor Law Board (*u*).

Such then, in general, are the duties of churchwardens (*x*); to which we shall only add, that, in case of their wasting the goods of the church, or being guilty of other misbehaviour, they are liable to removal (*y*); and that at the end of their year, they are bound to render an account of all their receipts and disbursements (*z*).

(*q*) 3 Inst. 202; Clifford *v.* Wicks, 1 B. & Ald. 506; *contrà* as to the chancel, Wats. C. L. 288.

(*r*) Rogers's Ecc. L. 179.

(*s*) Hawk. P. C. b. 1, c. 63, s. 29; Hawe *v.* Planner, 1 Saund. 10; S. C. 1 Sid. 301; Burton *v.* Henson, 10 Mee. & W. 105; Worth *v.* Terrington, 13 Mee. & W. 781.

(*t*) Among these was formerly the duty imposed upon them by a provision of 1 Eliz. c. 2, of levying a forfeiture of one shilling on all such as do not resort to their parish church on Sundays and holidays. But this, with other provisions against nonconformity, is now repealed by 9 & 10 Vict. c. 59.

(*u*) As to this Board, vide post, pt. III. c. II.

(*x*) In any parish the population of which exceeds 2000 persons, and which is brought under the provisions of 13 & 14 Vict. c. 57, a *vestry clerk* may be appointed, who is to assist and advise the churchwardens and overseers in the duties of their office.

(*y*) Steer, P. L. 95.

(*z*) Ibid. 92; Leman *v.* Goulty, 3 T. R. 3; Astle *v.* Thomas, 2 B. & C.

VIII. *Parish clerks* and *sextons* (*a*) are also persons connected with the church, and by the common law have freeholds in their office; though the former may, by 7 & 8 Vict. c. 59, s. 5, be suspended or removed by the archdeacon or other ordinary for misconduct or neglect (*b*). The duties of the parish clerk are too familiarly known to require description. In some few instances he is in holy orders (*c*): but his general qualification is only that he should be at least twenty years of age; known to the parson, vicar, or minister, to be of honest conversation, and sufficient for his office (*d*). [He is generally appointed by the incumbent (*e*); but by custom may be chosen by the inhabitants (*f*);] his appointment may be by word of mouth only (*g*); and his remuneration depends altogether upon the custom of the particular parish (*h*). The *sex-*

271. It is said that in London, the case of churchwardens is in some respects peculiar; that they are generally chosen there by the parishioners independently of the parson; are a corporation for all purposes; have the disposal of the seats in the church, independently of the bishop; and, in most of the churches, repair not only the church, but the chancel. (Pulling's Laws of London, p. 263.) The legality of such a custom as above mentioned with regard to seats, has however been questioned. (See Rogers's Ecc. L. p. 185.)

(*a*) Burn's Eccl. L. by Tyrw.; Steer, P. L. 96.

(*b*) As to the former law on this subject, see 2 Roll. Abr. 234; R. *v.* Davies, 9 D. & R. 234; R *v.* Neale, 4 Nev. & M. 868.

(*c*) See as to parish clerks in orders, 7 & 8 Vict. c. 59, ss. 2, 3, 4.

(*d*) Canon 91.

(*e*) Ibid. As to the appointment of a parish clerk in parishes united by special act of parliament, see Hartley *v.* Cook, 9 Bing. 728. In churches built under the Church Building Acts, he is to be annually appointed by the minister. (See 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; Pinder *v.* Barr, 4 Ell. & Bl. 105.) And the clerk and sexton of the church of any parish constituted under The New Parishes Acts (as to which Acts, vide post, p. 119), are to be appointed by the incumbent for the time being of such church, and are removable by him, with the consent of the bishop of the diocese for any misconduct. (19 & 20 Vict. c. 104, s. 9.)

(*f*) 13 Rep. 70; Jermyn's case, Cro. Jac. 670; Peak *v.* Bourne, Str. 942.

(*g*) R. *v.* Inhabitants of Bobbing, 5 A. & E. 682.

(*h*) Steer, P. L. 97. As to the fees and emoluments of the clerk

ton (*i*) is, in the ordinary course, chosen by the rector; though sometimes by the parishioners, where a usage to that effect prevails (*k*). His salary depends on custom, and is paid by the churchwardens (*l*); his duty is to cleanse the church, to open the pews, to fill up the graves for the dead, to provide candles and other necessaries, and to prevent disturbance in the church (*m*).

and the sexton in a parish newly constituted under the Church Building Acts, see 59 Geo. 3, c. 134, ss. 6, 10.

(*i*) Apparently from *sacristan*, the keeper of things belonging to divine worship.

(*k*) See R. *v.* Minister of Stoke Damerel, 5 A. & E. 587; R. *v.* Inhabitants of Bobbing, ibid. 682; Cansfield *v.* Blenkinsop, 4 Exch. 234. Rogers's Ecc. L. 834; vide sup. p. 43, note (*e*).

(*l*) Vide sup. p. 43, note (*h*).

(*m*) Vide R. *v.* Inhabitants of Liverpool, 3 T. R. 119; Shaw's P. L. 71. Besides the parish clerk and sexton, there is generally attached to the church a *beadle*, (from the Saxon *beodan*, to bid,) who is chosen by the vestry, and whose business is to attend the vestry, to give notice of its meetings to the parishioners, and execute its orders, and to assist the constable in apprehending vagrants, &c. Shaw's P. L. c. 19.

CHAPTER II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH, AND HEREIN OF THE LAWS AS TO HERESY AND NONCONFORMITY.

THOUGH this nation has constantly adhered to the principle of an established Church,—that is, a Church endowed, and (as occasion has required), protected, by the provision of the temporal law (*a*)—yet no claim was formerly made by the temporal law, to interfere with the regulation of its faith, ceremonies, or discipline. These, being matters *merè spiritualia* (*b*), fell under the exclusive province of the ecclesiastical authorities (*c*); who, in their exercise of it, were guided by the law of the popes and councils, modified from time to time by our own legatine and provincial constitutions (*d*). But at the era of the Reformation it was found necessary to resort to the legislature, for an authoritative exposition of the true Protestant faith, the establishment of appropriate forms of worship, and the declaration of the crown's supremacy, in lieu of that of the pope, in matters ecclesiastical; and from this time the power of the ordinary ecclesiastical authorities of the realm, has been exercised in subordination to these paramount institutions of the civil government.

And, first, the *Articles of Faith*, consisting originally of forty-two, but afterwards reduced to thirty-nine, (and com-

(*a*) "*Ecclesia Anglicana per inclitissimos progenitores et antecessores domini regis, laudabiliter dotata, et in suis juribus et libertatibus sustentata.*"—Stat. 2 Hen. 4, c. 15.

(*b*) Stat. *Circumspectè agatis*, 13 Edw. 1, st. 4, c. 1.

(*c*) "*Sanctæ determinationes ecclesiæ sacrosanctæ,*" 2 Hen. 4, c. 15; "*les leies de seinte esglise,*" 2 Hen. 5, st. 1, c. 7.

(*d*) Vide sup. vol. 1. p. 66.

monly called the *Thirty-nine Articles,*) were framed by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward the sixth (*e*); and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562 (*f*). And by statute 13 Eliz. c. 12, it was provided, that if any person ecclesiastical, or having ecclesiastical living, shall advisedly maintain any doctrine directly repugnant to any of the said articles; and, on being convened before the bishop, still persist therein; he shall be liable to be deprived (*g*).

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward the sixth, under the superintendence of Cranmer and his coadjutors (*h*). Before the Reformation various liturgies had been in use in different parts of the realm (*i*). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was now compiled for the uniform observance of the whole reformed Church of England. This Book of King Edward the sixth was, for the most part, the same with our present Book of Common Prayer. It was established by statute 2 & 3 Edw. VI. c. 1; and being afterwards re-

(*e*) The first draft of the Articles was made by Cranmer, assisted by Bishop Ridley, in 1551; and after being corrected by the other bishops, Latimer, Hooper, Poynet, Coverdale, &c. were published in 1553. In 1562, 1571, and 1662, they were successively revised and confirmed. Adams, Relig. World Displayed, vol. i. p. 399.

(*f*) See 13 Eliz. c. 12, s. 1.

(*g*) Ibid. sect. 2.

(*h*) Adams, Relig. World Displayed, vol. i. p. 402; see 2 & 3 Edw. 6, c. 1, s. 1.

(*i*) The statute 2 & 3 Edw. 6. c. 1, recites, that "of long time there hath "been had in this realm of England "divers forms of common prayer "commonly called the service of the "Church, that is to say, the use of "Sarum, of York, of Bangor, and of "Lincoln; and besides the same, "now of late much more divers and "sundry forms and fashions have "been in use in the cathedral and pa-"rish churches of England, Wales, "&c.' Almost the whole of our Liturgy was taken from the forms here described; particularly from that of Sarum; and most of it can be traced to periods before the Conquest. See Palmer's Origines Liturgicæ.

vised, was confirmed by 5 & 6 Edw. VI. c. 1, and 1 Eliz. c. 2.; and, after two other successive revisions in the reigns of Kings James the first (*k*) and Charles the second, was again confirmed, by 13 & 14 Car. II. c. 4 (*l*), usually described as *the* Act of Uniformity,—though all the statutes just mentioned are alike intituled, or, more particularly, Acts for the Uniformity of Service in the Church and Administration of the Sacraments. In the reign of King James the first a new version also of the Holy Scriptures was made, and established by law;—being the same which is still in use under the denomination of King James's Bible (*m*).

As to the *Crown's supremacy*, it was definitively established by 1 Eliz. c. 1 (*n*), usually called the Act of Supremacy; a statute which, first, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof (*o*); and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power, for visitation and correction of the Church, shall for ever, by authority of the present parliament, be united and annexed to the imperial crown of this realm (*p*).

The new regulations thus introduced by the legislature,—taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the national canon law, (which still gives the rule where these are silent,)—have constituted, from the period of which we speak, and still constitute, the standard

(*k*) Wats. C. L. p. 321.

(*l*) By 17 & 18 Car. 2, c. 6 (Irish), the provisions contained in 13 & 14 Car. 2, c. 4, were, with some modifications, extened to Ireland.

(*m*) The canonical authority of the different books of Scripture is settled by the Thirty-nine Articles.

(*n*) The supremacy had been before declared by 26 Hen. 8, c. 1, and indeed prior to the Reformation, by the Statute of Præmunire, 16 Ric. 2, c. 5. As to the supremacy, see also 5 Eliz. c. 1, ss. 1, 2, 3, 4, 10; Introd. to 4 Rep.; 4 Inst. 42, 331, 341.

(*o*) 1 Eliz. c. 1, s. 16.

(*p*) Sect. 17.

of faith, worship, and discipline in the Church of England. It remains, however, to consider on what persons, and in what cases, this standard is to be deemed imperative—whether it is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects of the realm, whatever may be in fact the state of their religious opinions. And here we shall find that the law has passed through changes of a very remarkable description. Though the statute of Elizabeth just cited effected an emancipation from the Roman yoke, and may therefore be justly considered as having laid the foundation of spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration: and our law in the mean time proceeded not only to imitate the persecutions of the Popish times, but in some respects to surpass them: for while it continued to punish as it had long done, (in aid of the ecclesiastical authorities,) the offence of *heresy*, it began now to exercise new rigours of its own, with respect to that of *nonconformity*. In the remainder of this chapter we propose to enter into some detail upon each of the subjects just enumerated; and to show both the former state of the law respecting them, and the alterations which it has latterly sustained.

1. *Heresy* was described among the canonists, in vague and general terms, as consisting of any deviation from the true Catholic faith, as understood by Holy Mother Church (q),—[very contrary to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness (r);] and spoke of heretics by name, as in the case of the Manichæans, Nestorians, and others (s). The cognizance of heresy has always been held in this country, and in every other where the canon law has prevailed, to belong to the ecclesiastical judge (t); and

(q) "*Hæreticus, qui de articulis fidei aliter prædicat, sentit, vel doceat, quàm docet sancta mater ecclesia.*"—Vide 1 Hale, P. C. 383.

(r) 4 Bl. Com. p. 45.

(s) Vide 1 Hale, P. C. 383.

(t) Year Book, 27 Hen. 8, 14 b; stat. 2 Hen. 4, c. 15; 1 Hale, P. C. 384; 4 Bl. Com. ubi sup.

the papal canonists have ever treated it with great severity. It is true that they [went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus.*]. They also in course of time [prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining without appeal whatever they pleased to be heresy; and shifting off to the secular arm the odium and drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray on behalf of the convicted heretic, *ut citra mortis periculum sententia, circa eum moderatur* (*u*), well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichæans, by the Emperors Theodosius and Justinian (*v*): hence also the constitution of the Emperor Frederic, mentioned by Lyndewode (*x*); adjudging all persons without distinction to be burned by fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution (*y*), ordained that if any temporal lord, when admonished by the Church, should neglect to clear his territories of heretics within a year, it should be lawful for good Catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power so long claimed and so fatally exerted by the Pope, of disposing even of the kingdoms of refractory princes, to more dutiful sons of the Church. The immediate event of this constitution was somewhat singular, and may serve to illustrate at once the gratitude of the holy see and the just punishment of the royal bigot,—for upon the authority of

(*u*) Decretal. lib. 5, t. 40, c. 27.
(*v*) Cod. l. i. tit. 5.
(*x*) C. de Hæreticis.
(*y*) Cod. 1, 5, 4.

[this very constitution the Pope afterwards expelled this very Emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou (z).

Christianity being thus deformed by the demon of persecution upon the continent, we cannot expect that our own island should have been entirely free from the same scourge.] And accordingly we not only find that our ecclesiastical courts were always in the habit of proceeding against heretics by spiritual punishments, such as excommunication and the like; but we discover [among our antient precedents a writ *de hæretico comburendo*, which is thought by some to be as antient as the common law itself (a).] However, it appears that it was not the practice of the common law of England to issue this writ except upon a conviction for contumacy or relapse; nor unless such conviction took place before the archbishop himself in a provincial synod or convocation: and that even that authority could not lawfully award the writ, but merely left the delinquent to the secular power; so that the crown might pardon him, if it thought proper, by forbearing to issue the writ; which was not grantable as of course, but issued by the special direction of the sovereign (b). [But in the reign of Henry the fourth, when the eyes of the Christian world began to open, and the seeds of the Protestant religion (though under the opprobrious name of Lollardy (c)) took root in this kingdom, the clergy, taking

(z) Baldus in Cod. 1, 5, 4.

(a) 1 Hale, P. C. 392; 1 Hawk. b. 1, c. 2, s. 10; vide St. Tr. vol. ii, 275. It seems clear, however, that at common law, heresy was not punishable by forfeiture of lands or goods. 1 Hale, P. C. 388, (n.)

(b) 1 Hale, P. C. 385, 393, 395. According to some opinions, the writ *de hæretico comburendo* was at common law, not only in *practice* confined to convictions before the archbishop in provincial synod, but could not *legally* be awarded on a conviction before any court of inferior authority, such as that of the diocesan. Vide 1 Hale, P. C. 391; 12 Rep. 56, 57.

(c) So called not from *lolium* or tares (an etymology which was afterwards devised in order to justify the burning of them, see Matth. xiii. 30), but from one Walter Lolhard, a German reformer, A.D. 1315. (Mod. Un. Hist. xxvi. 13; Spelm. Gloss. 371;) or as some hold from *Lollen*, to sing, in reference to their psalm singing. (D'Aubigné, Hist. of Reformation, vol. v. p. 130.)

[advantage from the king's dubious title, to demand an increase of their own power, obtained an act of parliament (*d*), which sharpened the edge of persecution to its utmost keenness. For by that statute the diocesan alone, without the intervention of a synod, might convict of heretical tenets: and unless the convict abjured his opinions, or if, after abjuration, he relapsed, the sheriff was bound, *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the stat. 2 Hen. V. c. 7, Lollardism was also made a temporal offence, and indictable in the king's courts; which did not, however, thereby gain an exclusive, but only a concurrent jurisdiction, with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated,—for though what heresy *is* was not then precisely defined, yet we are told in some points what it is *not*, —the statute 25 Hen. VIII. c. 14, declaring that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case, upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the Six Articles was made, which established the six most contested points of popery—transubstantiation—communion in one kind—the celibacy of the clergy—monastic vows—the sacrifice of the mass—and auricular confession; which points were "determined and resolved by the most godly "study, pain and travail of his majesty; for which his

(*d*) 2 Hen. 4, c. 15. A previous act, 5 Ric. 2, st. 2, c. 5, had been aimed at the followers of Wickliffe, but the commons would not assent to it, and it was revoked the next year. (See Reeves's Hist. Eng. L. vol. iii. p. 163.)

["most humble and obedient subjects, the lords spiritual "and temporal, and the commons, in parliament assembled, "did not only render and give unto his highness their most "high and hearty thanks," but did also enact and declare all oppugners of the first, to be heretics, and to be burned with fire,—and of the five last, to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

We shall not enter into the various repeals and revivals of these sanguinary laws in the two succeeding reigns, but shall proceed directly to the reign of Queen Elizabeth, when the Reformation was established] on a firm and permanent basis. By stat. 1 Eliz. c. 1, all former statutes relating to heresy are repealed, which left the jurisdiction of heresy as it stood at common law;] that is, left the simple offence to be visited by spiritual punishments in the ecclesiastical courts; and the offence, when aggravated by contumacy or relapse, to be dealt with by the writ *de hæretico comburendo*, after a conviction in the provincial synod. [But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being so determined, but only such tenets which have been heretofore so declared: 1. By the words of the Canonical Scriptures; 2. By the first four general councils, or such others as have only used the words of the Holy Scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation.

The writ, however, *de hæretico comburendo* still remained in force; and we have instances of its being put in execution upon two Anabaptists in the seventeenth year of Elizabeth, and upon two Arians in the ninth year of James the first. But it was totally abolished, and heresy at length

[subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign,] by the joint effect of this and other Acts before referred to (*e*), [our lands were delivered from the slavery of military tenures, our bodies from arbitrary imprisonment, and our minds from the tyranny of superstitious bigotry.] And such still continues to be the state of the law with respect to heresy; the only subsequent provision that is still in force in connection with this subject (*f*) being one that is directed rather to the preservation of good order and decency in civil society, than to the maintenance of orthodoxy. We refer to 9 & 10 Will. III. c. 32, by which it is enacted, that if any person, having been educated in, or made profession of Christianity, shall by writing, printing, teaching, or advised speaking, maintain that there are more Gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority; and be thereof convicted by two witnesses; he shall (unless he recants) incur such civil disabilities as mentioned in the Act; and, on a second conviction, shall also suffer imprisonment for the term of three years (*g*).

2. *Non-conformity* or dissent from the worship and ceremonies of the Established Church. This, by the second of the Acts of Uniformity, 5 & 6 Edw. VI. c. 1, was made a penal offence; it being thereby enacted (*h*), that if any manner of person shall willingly be present at any other manner or form of Common Prayer, of administration of the sacraments, of ordination, or of any other rites contained

(*e*) The act for abolishing military tenure, 12 Car. 2, c. 24 (vide sup. vol. I. p. 205); and the Habeas Corpus Act, 31 Car. 2, c. 2 (vide sup. vol. I. p. 146.)

(*f*) It may, however, be remarked that heretical opinions in a parson, vicar, or other person holding ecclesiastic preferment, are a cause of *deprivation*. See the Church Discipline Act, 3 & 4 Vict. c. 96; Ex parte Denison, 4 Ell. & Bl. 292.

(*g*) This act also contained similar enactments with regard to denying the Holy Trinity; but as to this is repealed by 53 Geo. 3, c. 160. (See Rex *v.* Waddington, 1 Barn. & Cress. 26.)

(*h*) 5 & 6 Edw. 6, c. 1, s. 6.

in the Book of Common Prayer, than is, in such Book, set forth,—he shall suffer imprisonment, and for the third offence imprisonment for life. And by the same statute, and by 1 Eliz. c. 2 (*i*), it was provided, that every inhabitant of the realm or dominion shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed; or, upon reasonable let, to some usual place where common prayer shall be used; on Sundays and holidays,—upon penalty of forfeiting for every non-attendance twelve pence, to be levied by the churchwardens to the use of the poor. And these enactments, though for a long course of time fallen into neglect, yet remained in our statute book till very recently; when they were, in common with many other penal and disabling laws in regard to religious opinions, swept away by the statute 9 & 10 Vict. c. 59, to which we shall make farther allusion at the close of this chapter.

In the reign, however, of Queen Elizabeth, a schism began to develop itself in the newly-established Protestant Church. Certain sectaries, who received the appellation of *Puritans*, deserting the use of the liturgy, betook themselves (notwithstanding the Acts of Uniformity) to forms of worship of their own institution (*k*); and ultimately, increasing in number, branched out into various divisions of religious opinion, and various modes of religious ceremonial and Church government. From this stock descended all those Protestant seceders from the Established Church, described at a later period as *Non-conformists*; and, in modern times, as *Dissenters* (*l*).

(*i*) 1 Eliz. c. 2, s. 14.

(*k*) Hallam, Const. Hist. vol. i. pp. 246, 251, 280.

(*l*) The most numerous bodies of Dissenters in this country are, 1. The *Wesleyan Methodists*; 2. The *Independents*, or *Congregationalists*; and 3. The *Baptists*; but the first and last of these are subdivided into various other denominations. The first are computed to have had in 1851, 11,007 places of worship, comprising 2,194,298 sittings; the second, 3,244 places of worship, comprising 1,067,760 sittings; the third, 2,789 places of worship, comprising

The jealousies to which these growing innovations gave rise, and the alarm from time to time reasonably excited by the enterprising spirit of Popery, gave birth in the same reign, and in those of several succeeding monarchs, to a variety of laws, having for their object the repression of Non-conformity, both in the case of Protestant Sectaries and Papists. It is unnecessary, however, to detail these provisions. It will suffice to state that, with respect to Papists,—including in this term all persons professing Popery, and more particularly Popish priests and Popish recusants, that is, persons refusing to conform to the ceremonies of the Church of England, or take the oath appointed against Papists,—they were of the most rigorous and oppressive character, involving not only civil disabilities, but imprisonment; and, in some cases, the penalties of felony or treason (*m*).

During the rebellion, the laws against Protestant Sectaries were repealed (*n*); but they revived at the Restoration; and the parliament of Charles the second proceeded to enforce systematically, by new measures of rigour, the principle of universal conformity to the Established Church. The first of these was the Corporation Act, 13 Car. II. st. 2, c. 1; by which it was provided, that no person should thereafter be elected to office in any corporate town, who should not, within one year previously, have taken the Sacrament of the Lord's Supper according to the rites of the Church of England: and every person, so elected, was also required to take (in addition to a certain oath and declara-

752,343 sittings.—Report of the Registrar-General on Religious Worship of England and Wales (founded on the census of 1851), p. cxliii.

(*m*) These laws are particularly detailed in Blackstone's Commentaries, vol. iv. p. 55; and such of them as remained in force up to a recent period, (which are numerous,) are recited and repealed by the statutes 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59.

(*n*) By an ordinance of this period, viz., that of 23 Aug. 1645, (which continued till the Restoration), to preach, write or print against the *directory*, or form appointed to be used for the then established Presbyterian worship, subjected the offender, upon indictment, to a fine not exceeding 50*l*. See Neale's Hist. of Puritans, vol. ii. p. 109.

tion afterwards repealed (*o*),) the oaths of allegiance and supremacy (*p*). Afterwards, by the Act of Uniformity (13 & 14 Car. II. c. 4), it was enacted, that the Book of Common Prayer, as then recently revised, should be used in every parish church and other place of public worship; and that every schoolmaster and person instructing youth should subscribe an acknowledgment declaring, (among other things,) that he would conform to the Liturgy. It further enacted, that no person should thenceforth be capable of holding any ecclesiastical promotion or dignity, of consecrating or administering the Sacrament, until he should be ordained priest according to episcopal ordination; and, with respect to all ministers who then enjoyed any ecclesiastical benefice, it directed that they should, within a certain period, openly read morning and evening service according to the Book of Common Prayer, and declare before the congregation their unfeigned assent and consent to the use of all things therein contained,—upon pain of being *ipso facto* deprived of their spiritual promotions. By this statute, two thousand of the clergy, who refused to comply with its provisions, were in fact deprived of their preferments (*q*).

Another measure of the same reign was the Act against Conventicles, 22 Car. II. c. 1 (*r*), by which all meetings consisting of five persons or more, (or of that number besides the household, in case of a family,) assembled for the exercise of religion in any manner than according to the practice of the Church of England, were prohibited, and made liable to dispersion; and the persons attending thereat (particularly as preachers or teachers) subject to pecuniary forfeitures. This was soon followed by the celebrated Test

(*o*) 5 Geo. 1, c. 6, s. 2.

(*p*) As to these oaths, vide sup. vol. II. p. 407.

(*q*) This statute also contained a regulation that no schoolmaster in a private house should instruct youth without having obtained a licence from the ordinary; but it was repealed *quoad hoc* by 9 & 10 Vict. c. 59.

(*r*) Repealed by 52 Geo. 3, c. 155; vide post, p. 60.

Act, 25 Car. II. c. 2, by which it was provided, that all persons having any office, civil or military, (with the exception of some few of an inferior kind,) or receiving pay from the crown, or holding a place of trust under it, should take the oaths of allegiance and supremacy, and subscribe a declaration against transubstantiation, and also receive the Sacrament of the Lord's Supper according to the usage of the Church of England. This provision had the effect of excluding not only Papists, but many classes of Protestant dissenters also, from every considerable place of trust or public employment. But it was mainly pointed against the former; as was also a subsequent act in the same reign (30 Car. II. st. 2), prohibiting any person from voting or sitting in parliament, until he should take the oaths of allegiance and supremacy, and subscribe a declaration against transubstantiation and the invocation of saints.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion, as well as politics; and by the Toleration Act, 1 W. & M. st. 1, c. 18 (confirmed by 10 Ann. c. 2), all persons dissenting from the Church of England (*s*) (except Papists and persons denying the Trinity) were relieved from such of the Acts against non-conformity, as prevented their assembling for religious worship according to their own forms, or otherwise restrained their religious liberty,—on condition of their taking the oaths of allegiance and supremacy, and subscribing a declaration against transubstantiation, and (in the case of dissenting *ministers*), subscribing also to certain of the Thirty-nine Articles. It was also made penal to disturb any congregation lawfully assembled, or to misuse their preachers; an offence which has been since prohibited under still heavier penalties (*t*). But it was on the other hand provided, by the same act of 1 W. & M.

(*s*) This provision extends not only to laymen, but to clergymen who after ordination become dissenters from the Church. (Barnes *v.* Shore, 8 Q. B. 640.)

(*t*) 52 Geo. 3, c. 155, s. 12; and see 9 & 10 Vict. c. 59, s. 4.

st. 1, c. 18, that no congregation should be allowed under it, unless the place of their meeting was certified to and registered with the bishop, or archdeacon, or court of quarter sessions. And it was also required, that the doors of the meeting-house should not be locked, barred, nor bolted. To these regulations some others were added for the relief of Protestant dissenters; among which is the following,—that when appointed to any parochial office which they might scruple, (in respect of the oaths or otherwise,) to undertake, they should be at liberty to serve by deputy.

It was thought necessary, on the other hand, soon after the accession of the House of Brunswick, to extend some of the provisions of the Test Act to various descriptions of persons besides those holding civil and military offices; and it was consequently enacted by 1 Geo. I. st. 2, c. 13, 2 Geo. II. c. 31, and 9 Geo. II. c. 26, that not only such officers, but also all ecclesiastical and collegiate persons, preachers, teachers and schoolmasters, high constables and practitioners of the law should, at the peril of incurring loss of office and other forfeitures and disabilities, take and subscribe, within six calendar months after their admission into preferment or practice, the oaths of allegiance, supremacy and abjuration; which latter oath was afterwards put into a new form by 6 Geo. III. c. 53 (*u*).

These oaths (which impose, it will be observed, rather a political than a religious test), are still required by law (*v*); though it has been long the custom to pass an act before the end of every session of parliament, indemnifying those who may happen to have neglected to take them, and against whom no judgment shall have yet actually passed for such offence; upon condition however of their repairing

(*u*) As to these oaths, vide sup. vol. II. p. 407.

(*v*) But by 3 & 4 Will. 4, c. 49 *Quakers* and *Moravians* are permitted to make *affirmation* in all cases where an oath is required; and a form of affirmation is given in lieu of the oath of abjuration: by 3 & 4 Will. 4, c. 82, a similar indulgence is granted to *Separatists*; and by 1 & 2 Vict. c. 77, to any person who shall *have been* a Quaker or Moravian.

their omission within a certain specified period (x). But in the state of the law relating more directly to non-conformity, great additional relaxations have been progressively introduced during the last four reigns—fruits of the ever advancing liberality of the present age, in matters deemed to affect the freedom of conscience.

In this spirit it was in the first placed provided by 19 Geo. III. c. 44, that any dissenting preachers or teachers may be entitled to all the benefits of the Toleration Act, by taking the oaths, and subscribing the declaration against popery therein mentioned, and also making or subscribing a declaration professing themselves to be Christians and Protestants, and that they believe the Scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. The same Act relieved every dissenting minister, or other Protestant dissenter, conforming to these conditions, from the provisions of 13 & 14 Car. II. c. 4, by which they were prevented from keeping schools or instructing youth: but there was a proviso, that nothing therein contained should extend to the enabling any dissenter to hold the mastership of a college or other endowed school, unless endowed since the first year of William and Mary, for the immediate benefit of Protestant dissenters. Then followed the 52 Geo. III. c. 155, by which both ministers and hearers were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace; and by which it was enacted, that all persons officiating in or resorting to religious establishments duly certified as required by the Toleration Act, should be as fully relieved from all penalties relating to religious worship, as if they had made the declaration and taken the oaths required by any previous statute. In order, however, to prevent irregular assemblies or conventicles of persons of any religious persuasion, this Act (after repealing 22 Car. II. c. 1) (y) prohibited

(x) See a recent Act of this description, 20 Vict. c. 7.

(y) Vide sup. p. 56.

under a penalty not exceeding £20, all assemblies for religious worship in any place (other than a church or chapel of the Church of England), at which more than twenty persons besides the family should be present, unless such place should be duly certified. By this statute it was also enacted, that every teacher or preacher of a congregation in a place duly certified, who should employ himself solely as such, and not engage in any trade or business except that of schoolmaster, and who should take the oaths and subscribe the declaration, should be exempt from serving on juries or bearing parochial offices; to which was added an exemption from serving in the militia. In the next year also was passed the statute 53 Geo. III. c. 160 (z), repealing that clause of the Toleration Act which excepted persons denying the Trinity from the benefit of its enactments.

The Protestant dissenters, however, still remained, notwithstanding these provisions, subject to the obligation imposed by the Corporation and Test Acts, on all those who were admitted to any office, of taking the Sacrament of the Lord's Supper according to the rites of the Church of England; but this galling disability was at length removed by the 9 Geo. IV. c. 17, by which so much of these and other statutes as requires the taking of the Sacrament is repealed as to all persons whatever; and a new form of declaration substituted; viz., a declaration to the effect that "upon the true faith of a Christian (a)" the party will never exercise any power, authority, or influence, by virtue of the office in question, to injure, weaken, or disturb the English Church, or its bishops and clergy; and this declaration must be made in general by every person admitted to office, who in the former state of the law would have been bound to take the Sacrament upon such his admis-

(z) By a recent Act, 7 & 8 Vict. c. 45, the benefits of 1 W. & M. sess. 1, c. 18; 19 Geo. 3, c. 44; and 53 Geo. 3, c. 160, are extended to endowments for dissenters prior to those Acts, and unlawful till they passed.

(a) As to these words, see Miller v. Salomons, 8 Exch. 778, et sup. vol. I. p. 415.

sion (*b*). And to this list of concessions we are now to add, that by 18 & 19 Vict. c. 81, (repealing a prior act of 15 & 16 Vict. c. 36, in reference to the same subject,) dissenters are allowed to certify their places of worship and register them with the Registrar-General of Births, Deaths, and Marriages (*c*), instead of the episcopal or other authorities mentioned in the Toleration Act (*d*); and that by an act of the same session, c. 86, "for securing the liberty of religious worship," it is enacted, that the provisions above referred to contained in the Toleration Act and the 52 Geo. III. c. 155, prohibiting congregations or assemblies for religious worship unless in a church or chapel of the established church, or place duly certified, shall henceforth not be applicable to any congregation or assembly for religious worship, held in any parish or any ecclesiastical district, and conducted by the incumbent; or, in case the incumbent is not resident, by the curate of such parish or district, or by any person authorized by them respectively: nor to any congregation or assembly for religious worship, meeting in a private dwelling-house or on the premises belonging thereto; or meeting occasionally in any building or buildings not usually appropriated to purposes of religious worship (*e*).

We have hitherto confined our view to the progress of toleration in regard to Protestant dissenters. As respects

(*b*) By 5 & 6 Will. 4, c. 28, the declaration need not be made by sheriffs of counties corporate; and by 1 & 2 Vict. c. 5, and c. 15, a different form of declaration is provided for Quakers, Moravians, and Separatists; and by 8 & 9 Vict. c. 52, for *Jews* admitted to municipal offices. Where the declaration required by law is refused, the election is *ipso facto* void. (R. *v.* Humphrey, 10 A. & E. 365.)

(*c*) A place of meeting for religious worship, duly certified and recorded by the Registrar-General under these statutes, is exempt from the operation of the Charitable Trusts Act, 1853 (as to which Act, vide post, pt. III. c. III.), 18 & 19 Vict. c. 81, s. 9.

(*d*) As to certified places of worship, see also 19 & 20 Vict. c. 119, ss. 17, 24.

(*e*) It appears by 19 & 20 Vict. c. 119, s. 24, that prior to June, 1852, the total number of places of meeting returned to the Registrar-General under 15 & 16 Vict. c. 36 amounted to 54,804.

persons professing the Roman Catholic Religion, it has been slower and more reluctant, though in the result not less decisive. By statutes of 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43 Geo. III. c. 30, most of the severer penalties and disabilities to which they were formerly subject were removed on condition of their qualifying by such oaths and declaration as in those Acts respectively provided; and assemblies for Roman Catholic worship were legalized on condition of their being held in places certified and recorded at the general or quarter sessions of the peace, (for which the certifying and recording with the Registrar General has been since substituted (*f*)): and at length by 10 Geo. IV. c. 7, commonly called the Catholic Emancipation Act, Roman Catholics were restored, in general, to the full enjoyment of all civil rights. By the provisions of this statute, all enactments by which any declaration against transubstantiation, the invocation of the saints, or the sacrifice of the mass, was required from any persons, as a qualification for sitting in parliament or otherwise, are repealed; and persons professing the Roman Catholic religion, upon taking and subscribing an oath prescribed by the Act, (which comprises, among other things, the abjuration of any intention to subvert the Church Establishment, and the promise never to exercise any privilege to disturb or weaken the Protestant religion or Protestant government,) are made competent to vote at parliamentary elections, to be members of lay corporations, and to sit in parliament. They are also qualified, upon taking and subscribing the same oath, (which is to stand in place of all other tests whatever,) to exercise any franchise or civil right, except in certain cases where their doing so would presumably be prejudicial to protestantism, as in the case of presenting to a benefice (*g*),—and to hold any office, with the excep-

(*f*) By 18 & 19 Vict. c. 81, s. 2.

(*g*) See 3 Jac. 1, c. 5; 11 Geo. 2, c. 17, and 7 & 8 Vict. c. 102, as to the inability of papists to present to benefices or grant advowsons; and 10 Geo. 4, c. 7, ss. 29, 31, prohibiting Jesuits and monks to come into the realm without licence.

tion of the following,—the office of guardian, justice, or regent of the united kingdom, of lord high chancellor, or commissioner or keeper of the great seal; of lord lieutenant, deputy, or chief governor of Ireland; of high commissioner of the general assembly of Scotland; or any office in the church, or the ecclesiastical courts, or in the universities, colleges, or public schools.

Doubts, however, having been still entertained as to the right of Roman Catholic subjects in England to acquire and hold, in real estate, the property necessary for religious worship, and for educational or charitable purposes,—it was afterwards, by another act of the 2 & 3 Will. IV. c. 115, provided that they should be subject, in respect of their schools and places for religious worship education and charitable purposes, and the property held therewith, and the persons employed in and about the same, to the same laws as were applicable to Protestant dissenters (*h*). And the triumph of toleration, as regards the Roman Catholic subjects of the realm, has been since consummated by the acts of 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, which recite and repeal almost the whole of such enactments as still remained in force (however fallen into oblivion), and were thought calculated in any manner to oppress this portion of the community on account of their religious persuasion.

Thus amply has the law at length provided for the freedom of religious opinion (*i*). In all other respects, however,

(*h*) By 9 & 10 Vict. c. 59, the same privilege is now extended to the *Jews*; as to whose legal condition in other respects, vide sup. vol. II. p. 415. And by 18 & 19 Vict. c. 86, s. 2, it is enacted, that the provisions in 2 & 3 Will. 4, c. 115, and 9 & 10 Vict. c. 59, as to the places of worship of the Roman Catholics and Jews, shall be read as applicable to the laws to which Protestant dissenters are subject for the time being, after the passing of that Act—that is to say, after the 14th August, 1855.

(*i*) Among the statutes *connected* with this subject may be ranked the 1 & 2 Vict. c. 105, by which an oath lawfully administered to any person on any occasion whatever is allowed to be binding, provided it be administered in such form and with such ceremonies as he declares to be binding. And the provision contained

the rights and pre-eminence of the Established Church have been hitherto maintained inviolate; and though no longer upheld by penal laws against non-conformity, she retains, in full possession, all those dignities and endowments which, at the period of the Reformation, were allotted exclusively to her ministers.

in the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), allowing any person called as a witness, or required or desiring to make an affidavit or deposition, who shall refuse or be unwilling from alleged conscientious motives to be sworn, to obtain from the court, (on its being satisfied of the sincerity of the objection,) permission to make solemn affirmation or declaration instead. (Sect. 20.)

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE CHURCH.



The endowments and provisions belonging to the different ecclesiastical authorities, as such, comprise lands, advowsons, and tithes; all of which have been occasionally annexed to ecclesiastical preferments by the munificence of antient or modern donors; the last are incident of common right to every parochial church. But in a large proportion of parishes the tithes have now been commuted (as will be presently explained) into rent-charges,—which must be considered as in some measure a different species of endowment,—though in truth it is but the representative and equivalent for tithe, and subject in many respects to the same legal incidents (*a*).

These endowments we propose to consider, first, as regards the subject of property itself; secondly, the estates which ecclesiastical persons, as such, may hold therein; thirdly, the power of alienation which they are competent to exercise.

I. As regards the subject of property.

And herein, first, as to *lands* (a term which, it is to be recollected, includes houses and other buildings) (*b*), there are but few particulars to be noticed in respect of these when held by ecclesiastical persons: the incidents relating to lands in general, whether held by clergymen

(*a*) 6 & 7 Will. 4, c. 71, s. 71.

(*b*) Vide sup. vol. I. p. 169.

or laymen, having been sufficiently explained in an earlier part of the work.

We may observe, however, that the boundaries of church lands are often subject to great uncertainty; and therefore by 2 & 3 Will. IV. c. 80—reciting that the archbishops and bishops, deans and chapters, deans and other dignitaries and officers of the several cathedral and collegiate churches and chapels, and the societies of the colleges and halls in the Universities of Cambridge and Oxford and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tithes and hereditaments, and in many cases the boundaries or quantities and identity of such property are unknown or disputed,—it is provided that it shall be lawful for any such corporation sole or aggregate, (with such consent as in the act mentioned,) to enter into agreement with their tenants or undertenants, or the owners of adjoining hereditaments, to refer any such disputed point to arbitration.

We may remark, too, that the property of ecclesiastical persons, besides other possessions, generally includes official houses of residence; in which, as explained in a former place (*c*), the law requires them actually to reside. These they are also bound, both by statute and by the common law of the realm, to keep in repair; and they may not only be compelled to do so during their incumbency, by authority of the bishop of the diocese (*d*); but if they commit waste upon them, or allow them to go to waste, remedy may, after their deaths, be had by their successors against their personal representatives, for such *dilapidation* (as it is called): and this remedy may be had either in the ecclesiastical or in the temporal courts (*e*). Numer-

(*c*) Vide sup. p. 33.

(*d*) 13 Eliz. c. 10; 1 & 2 Vict. c. 106, ss. 35, 41; North *v.* Barker, 3 Phill. 309; Rogers's Ecc. L. 307.

(*e*) 13 Eliz. c. 10; 14 Eliz. c. 11. s. 18. As to the action for dilapidations, see Ratcliffe *v.* D'Oyley, 2 T. R. 630; Wise *v.* Metcalfe, 10 B. & C. 299; Bird *v.* Relph, 4 B. & Adol. 826; 2 Ad. & El. 773; Downes *v.* Craig, 9 M. & W. 166; Bunbury *v.* Hewson, 3 Exch. 558; Warren *v.* Lugger, ib. 579; Bryan *v.* Clay, 1 Ell. & Bl. 38; Jenkins

ous provisions, moreover, as before noticed, are made by law, to enable ecclesiastical persons to repair or rebuild their residences or provide new ones. The methods of doing this are by raising money to a limited amount (according to the value of the benefice), by mortgage of its profits, (which money the governors of Queen Anne's bounty (*f*) are specially empowered to advance); or by sale or exchange of the present houses, in order to obtain others that are more convenient; the principal statutes on which subjects are 17 Geo. III. c. 53 (commonly called Gilbert's Act), 1 & 2 Vict. c. 23, and 5 & 6 Vict. c. 26 (*g*). In addition to which, we may remark, that, by 1 & 2 Vict. c. 106 (*h*), every bishop is directed, on avoidance of any benefice, to issue a commission to ascertain whether there is a fit house of residence, and supposing none to exist, and the profits to exceed 100*l.* per annum, to ascertain whether such house can be conveniently provided; and thereupon, by mortgage of the profits, to raise the sum required, or otherwise state in detail his reasons for not doing so, at his next annual return to her majesty in council. And that by 19 & 20 Vict. c. 50, it is provided, as to advowsons vested in (or in trustees for) *inhabitants*, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom,—that the same may be sold by order of such persons, and the proceeds applied to such beneficial purposes as therein specified, including the erection of a parsonage house, if there be none, or the rebuilding, repair or improvement (if necessary), of the existing parsonage house (*i*).

v. Betham, 15 C. B. 168. As to the proceedings in the ecclesiastical court, see Whinfield *v.* Watkins, 2 Phil. 3. See also Rogers's Ecc. L. p. 307; and Degge's Parson's Counsellor, pt. i. c. 8.

(*f*) As to Queen Anne's bounty, vide sup. vol. II. p. 542.

(*g*) See also the other statutes cited sup. p. 35, n. (*r*).

(*h*) 1 & 2 Vict. c. 106, s. 62.

(*i*) Advowsons belonging to endowed charities within the provisions of the Charitable Trusts Acts, 1853, 1855 (vide post, chap. III.) are not within this statute. (19 & 20 Vict. c. 50, s. 1.)

With respect to a rector and vicar in particular, it is also to be observed, that he is generally seised not only of the parsonage or vicarage house, but of some portion of land (or *glebe*, as it is called (*j*)) attached to his benefice, as part of its endowment: and that by a late statute, 5 & 6 Vict. c. 54, it is provided, that the commissioners appointed to carry into effect the commutation of tithes shall have power to ascertain and define the boundaries of the glebe lands of any benefice (*k*); and also power, with consent of the ordinary and patron, to exchange the glebe lands for other lands within the same or any adjoining parish, or otherwise conveniently situated (*l*). And, moreover, that by 17 & 18 Vict. c. 84, the incumbent of any benefice entitled to glebe is, with such consents as in the act specified, enabled to annex such glebe or other land, by deed, to any church or chapel within the parish, district or place wherein such glebe or land is situate; to the intent that it may be held and enjoyed by the incumbent for the time being of such church or chapel (*m*). A rector or vicar is also seised, in every case, of the edifice of the church itself. In rectories, not merely the body of the church, but the chancel and the churchyard also, are the freehold of the rector (*n*). In vicarages, the body of the church and the churchyard are the vicar's freehold; the chancel that of the impropriator (*o*). Yet, with the exception of the chief pew in the chancel, (which belongs to the rector or impropriator (*p*),) the disposal of the pews and seats in the church appertains, by

(*j*) "*Gleba est terra in qua consistit dos ecclesiæ.*"—Com. Dig. Dismes, B. 2, where it is said that every church of common right ought to have a manse and glebe. As to the providing and exchanging of glebes, see 43 Geo. 3, c. 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 6 Geo. 4, c. 8.

(*k*) 5 & 6 Vict. c. 54, s. 5.

(*l*) Ibid.

(*m*) 17 & 18 Vict. c. 84, s. 2. This statute is in extension of 29 Car. 2, c. 8; 1 & 2 Will. 4, c. 45; and 1 & 2 Vict. c. 107, s. 14,—former provisions for the augmentation of benefices.

(*n*) See Clifford *v.* Wicks, 1 B. & Ald. 498; Beckwith *v.* Harding, ib. 508; Rich *v.* Bushnell, 4 Hagg. 164.

(*o*) Wats. C. L. 391.

(*p*) Rogers's Ecc. L. 171; Clifford *v.* Wicks, ubi sup.

law, not to the rector, vicar, or impropriator, but (as formerly shown,) to the ordinary; and, practically, to the churchwardens, to whom the authority of the ordinary, in this respect, is delegated (q). Moreover, no monument can be set up without the ordinary's consent (r). And an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the ordinary, to an individual and his heirs, as appurtenant to a particular messuage in the parish: indeed a man may prescribe for these, as so appurtenant, without showing a faculty, if he can prove that they have been used and repaired, from time immemorial, by those under whom he claims; for such immemorial enjoyment is evidence of a faculty formerly obtained (s). As to the repairs of the body of the church and inclosure of the churchyard, they fall of common right on the parishioners (t); but those of the chancel, on the parson, or supposing the benefice to be a vicarage, then, generally, on the impropriator (u).

Among the subjects of church property we enumerated *advowsons* and *tithes:* and to these it will now be proper to devote a more particular attention.

1. As to *Advowsons.*—Advowsons are of the class of hereditaments incorporeal; but were simply mentioned without being discussed, in that part of the first volume allotted to incorporeal hereditaments in general (x): because, though capable of being held, and in fact held indifferently, both by laymen and ecclesiastics (y), their

(q) Vide sup. p. 41; Rogers's Ecc. L. 179.

(r) Beckwith *v.* Harding, 1 B. & Ald. 498; Rich *v.* Bushnell, 4 Hagg. 164.

(s) Wats. C. L. 643, 644; 2 Bl. Com. 429.

(t) As to this, vide sup. p. 41; 2 Inst. 489, 653; Gosling *v.* Veley, 12 Q. B. 345.

(u) Wats. C. L. 391, where it is said that this is not the case in *London*, as to which see also sup. p. 42, n. (z).

(x) Vide sup. vol. I. p. 647.

(y) As to the origin of ecclesiastical property in advowsons, vide Rennell *v.* Bp. of Lincoln, 3 Bing. 223; 7 B. & C. 113; Mirehouse *v.* Rennell, 8 Bing. 490.

close connection in other respects with the law of the Church seemed naturally to assign them to the present division of our work.

An advowson (*advocatio*) [is the right of presentation to a church or ecclesiastical benefice] (*z*); and this word [signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence, as was formerly mentioned (*a*), arose the division of parishes,) the lord, who thus built a church and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in a word, the patron (*b*).] And this power is, by derivation of title from the lords of manors, now claimed by many other private persons; and by many corporations, both lay and ecclesiastical (*c*). But it is to be observed, that an alien or papist cannot exercise the rights of a patron; and that if the former purchase an advowson, the crown shall present; if the latter, the Universities of Cambridge and Oxford (*d*). An incumbent may be constituted, as explained in a former chapter (*e*), either by way of presentation, collation, or donation, as

(*z*) For the law on this subject generally, see Mirehouse on Advowsons.

(*a*) Vide sup. vol. I. p. 116.

(*b*) Co. Litt. 119 b; Gibs. Cod. 7, 57, 2nd edit. This original of the *jus patronatus*, viz. building and endowing the church, appears also to have been allowed in the Roman empire. (Nov. 26, t. 12, c. 2; Nov. 118, c. 23.)

(*c*) Municipal corporations, however, are disabled from exercising church patronage; 5 & 6 Will. 4, c. 6, s. 139, and 2 Vict. c. 31; 2 Scott, N. R. 394.

(*d*) Rogers, Ecc. L. 17; 3 Jac. 1, c. 5; 1 W. & M. st. 1, c. 26; 12 Ann. st. 2, c. 14, s. 1; 11 Geo. 2, c. 17; Edwards *v.* Bishop of Exeter, 5 Bing. N. C. 654.

(*e*) Vide sup. pp. 27, 31.

the case may be; and according to this distinction, an advowson is said in these cases respectively to be either *presentative*, *collative*, or *donative* (*f*).

[Advowsons also are either advowsons *appendant* or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches (*g*), the right of patronage or presentation, so long as it continues annexed to the possession of the manor—as some have done from the foundation of the church to this day—is called an advowson appendant (*h*); and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (*i*). But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross* or at large;] being annexed no longer to the manor or lands, but to the person of the owner (*k*); and where the inheritance either of the manor or the advowson has been thus separately conveyed, the advowson remains for ever in gross, and cannot be appendant any more (*l*). When thus in gross, it may be conveyed in the same manner as any other incorporeal hereditament (*m*). Moreover, not only the advowson itself, but the next or any number of future *presentations* may, during an existing incumbency, be conveyed (in like manner) by the owner (*n*); and the grantee of a next presentation becomes *pro hâc vice*, the patron. And as to either species of patron, this rule is to be observed, that if he dies after a vacancy has happened, and before it is filled up, the right to present for the then next turn, (being as it were a fruit fallen,) is considered as personal, not real estate, and goes to his executor, and not

(*f*) 2 Bl. Com. 22; Co. Litt. 119 b.
(*g*) Co. Litt. 119 b.
(*h*) Ibid. 121.
(*i*) Ibid. 307.
(*k*) Ibid. 120.
(*l*) 2 Bl. Com. 22.
(*m*) Vide sup. vol. I. p. 682.
(*n*) Co. Litt. 249 a; Plowd. 150; Crisp's case, Cro. Eliz. 164; Elvis *v.* Abp. of York, Hob. 322; Alston *v.* Atlay, 7 A. & E. 289; Rogers, Ecc. L. 9.

to his heir (*o*). The exercise of his right, by a patron of either description, is also subject to the restrictions imposed by the law of *lapse*, and the law of *simony*.

First. [*Lapse* is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the crown, by neglect of the metropolitan. For, it being for the interest of religion and the good of the public, that the church should be provided with an officiating minister, the law has, therefore, given this right of lapse in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. The right of lapse was first established about the time (though not by the authority (*p*)) of the Council of Lateran (*q*): which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches (*r*). And, therefore, where there is no right of institution, there is no right of lapse: so that no *donative* can lapse to the ordinary (*s*), unless it hath been augmented by Queen Anne's Bounty;] when, by statute, it is made subject to that incident (*t*). And it is also to be observed, that [no right of lapse can accrue when the original presentation is in the crown (*u*).

The term, in which the title to present by lapse, accrues from the one to the other successively, is six calendar months (*x*),] that is, 182 days (*y*); [and this exclusive of

(*o*) Rennell *v.* Bp. of Lincoln, 7 B. & C. 113.

(*p*) 2 Roll. Ab. 54; Presentment, Lapse (O).

(*q*) Bract. l. 4, tr. 2, c. 3.

(*r*) Vide sup. p. 31.

(*s*) Bro. Ab. tit. Quare Impedit; Fitton *v.* Hall, Cro. Jac. 518. The ordinary, however, may, by ecclesiastical censures, compel the patron to fill the vacant donative. 2 Burn, Ecc. L. 363.

(*t*) 1 Geo. 1, st. 2, c. 10, ss. 6, 7; Rogers, Ecc. L. 354.

(*u*) St. 17 Edw. 2, c. 8; 2 Inst. 273.

(*x*) Catesby's case, 6 Rep. 62; Regist. 42.

(*y*) Wats. C. L. 109; Bp. of Peterborough *v.* Catesby, Cro. Jac. 166; 2 Inst. 360.

[the day of the avoidance (z). But if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (a); for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (b). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (c). For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one: which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the crown, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the sovereign has satisfied his turn by presentation; for *nullum tempus occurrit regi* (d). And therefore it may seem as if the church might continue void for ever, unless the crown shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law hath lodged a power in the patron's hands of, as it were, compelling the crown to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the sovereign, indeed, by pre-

(z) 2 Inst. 361; Wats. C. L. 109.
(a) Gibs. Cod. 769.
(b) 2 Inst. 273.
(c) 2 Roll. Ab. 368.
(d) Doctor and Student, d. 2, c. 36; R. v. Abp. of Canterbury, Cro. Car. 355. As to this maxim, vide sup. vol. II. p. 493.

[senting another, may turn out the patron's clerk; or, after induction, may remove him by] bringing an action called a [*quare impedit:* but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the crown hath lost the right, which was only to the next or first presentation (*e*).

In case the benefice becomes void by death, or cession through plurality of benefices (*f*), there the patron is bound to take notice of the vacancy, at his own peril;] and the six months date from the period of the death or cession (*g*); [for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation or canonical deprivation (*h*), or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron (*i*);] and the six months shall date only from the time when such notice shall be given (*j*); though as to this, a distinction is made in the case of an *ecclesiastical* patron, who is held not entitled to notice of insufficiency, because he is competent to choose an able clerk (*k*). [Neither shall any lapse accrue to the metropolitan or the sovereign], in cases where the bishop is thus precluded by neglect to give notice, from collation; [for it is universally true, that neither the archbishop nor the crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*l*). If the bishop refuse or

(*e*) Baskerville's case, 7 Rep. 28; Beverley *v.* Cornewall, Cro. Eliz. 44. As to *quare impedit*, vide post, bk. v. c. XI.

(*f*) As to cession, vide sup. p. 35.

(*g*) Semb. and not from the time when patron *could reasonably have had* notice; Wats. C. L. 5; Rogers, Ecc. L. 488.

(*h*) Ibid.

(*i*) Vide sup. p. 28.

(*j*) 2 Burn, Ecc. L. 157.

(*k*) 2 Roll. Ab. 364; 2 Burn, ubi sup.

(*l*) Co. Litt. 344, 345.

[neglect to examine and admit the patron's clerk, without good reason assigned, or notice given, he is styled a disturber, by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*m*). Also, if the right to presentation be litigious and contested, and an action be brought to try the title,] making the bishop a defendant, [no lapse shall incur until the question of right be decided (*n*).]

Secondly, *Simony* is also a species of forfeiture, whereby [the right of presentation to a living is forfeited and vested *pro hâc vice* in the crown. Simony means the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward (*o*). It is so called from the resemblance it is said to bear to the sin of Simon Magus: though the purchasing of holy orders (*p*) seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious because, as Sir E. Coke observes (*q*), it is ever accompanied with perjury; for the presentee is sworn to have committed no simony.] Whether it was an offence punishable at the common law has been doubted (*r*); and though the clerk who committed simony was always subject to ecclesiastical censures (*s*), these were [not efficacious enough to repel the notorious practice of the thing;] particularly as they [did not affect the simoniacal patron;] so that [divers acts of parliament have been made to restrain it by means of civil forfeiture (*t*).] And these shall be briefly considered in this place.

(*m*) Co. Litt. 344.

(*n*) 2 Bl. C. 278; Wats. Ch. L. 112; 2 Burn, Ecc. L. 358; Rogers, Ecc. L. 488.

(*o*) Baker *v.* Rogers, Cro. Eliz. 790.

(*p*) As to this vide sup. p. 3.

(*q*) 3 Inst. 156; Can. 40.

(*r*) Blackstone says it was *not* an offence at common law, 2 Bl. C. 278: but see Bp. of St. David's *v.* Lucy, 1 Ld. Raym. 449; Greenwood *v.* Bp. of London, 5 Taunt. 745; and the other authorities cited, Rogers, Ecc. L. 840.

(*s*) Spelm. Concil. 2, 12; vide Whish *v.* Hesse, 3 Hagg. 659; Degge, 36.

(*t*) 2 Bl. Com. 279.

By the statute 31 Eliz. c. 6 (*u*), it is, for avoiding of simony, enacted, that if any person, for any sum of money or reward, or promise of money or reward, shall present or collate, admit, institute, induct, or instal any other person to any ecclesiastical benefice or dignity, [both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same (*x*);] and [such presentation also shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that turn: but if the presentee dies without being convicted of such simony in his lifetime, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of a lapse to the crown or otherwise.] The same statute of Elizabeth also contains provisions against corrupt resignations and exchanges. And [by the Statute 12 Anne, st. 2, c. 12, if any person, for] money or reward, or promise of money or reward, [shall procure in his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subject to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen with regard to what is, and what is not, simony: and, among others, these points seem to be clearly settled.] 1. That the sale of an *advowson*, (whether the living be full or not), is not simoniacal, unless connected with a corrupt contract or design as to the next presentation; though if an advowson be granted during the vacancy of the benefice, the presentation on that vacancy can in no case pass by the grant (*y*). 2. [That to purchase a] next [*presentation*,

(*u*) As to pleading this statute, to an action on a contract, see Goldham *v.* Edwards, 16 C. B. 437; 18 C. B. 389.

(*x*) 4 Bl. Com. 63.

(*y*) As to sale of an advowson, see

[the living being actually vacant, is open and notorious simony; this being expressly in the face of the statute (z).] 3. [That for a *clerk* to bargain for the next presentation, the incumbent being sick and about to die, was simony even before the statute of Queen Anne (a); and now by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony.] But, 4, a bargain by *any other* person for the next presentation, (even if the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (b). 5. [That if a simoniacal contract be made with the patron, the clerk] presented [not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron (c); but the clerk who is innocent, does not] otherwise [incur any disability or forfeiture (d).] 6. [That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal (e), provided the patron or his relations be not benefited thereby (f); for this is no corrupt consideration moving to the patron.] In addition to these points, we may notice that it has been a frequent practice for the patron to take from the presentee a bond, (usually called a *resignation* bond,) or other engagement, to resign the benefice at a future period, in favour of some particular individual named by the patron; or, at the

Bac. Ab. tit. Simony, 189; Grey v. Hesketh, Ambl. 268; Barret v. Glubb, 2 Bl. Rep. 1052; Bishop of Lincoln v. Wolforstan, 2 Wils. 174; 3 Burr. 1504, S. C. in error; Greenwood v. Bishop of London, 5 Taunt. 745; Fox v. Bishop of Chester, 6 Bing. 1; Alston v. Atlay, 6 Nev. & M. 686; and see 19 & 20 Vict. c. 50, mentioned sup. p. 67.

(z) Baker v. Rogers, Cro. Eliz. 788; Moor, 914, S. C.

(a) Winchcombe v. Bp. of Winchester, Hob. 165.

(b) Fox v. Bishop of Chester, ubi sup.; 3 Bligh, N. S. 123, S. C.

(c) See Whish v. Hesse, 3 Hagg. 659.

(d) 3 Inst. 154; R. v. Bishop of Norwich, Cro. Jac. 385.

(e) Noy, 142.

(f) Peele v. Capel, Stra. 534.

request of the latter, generally: and the validity of such engagements has been the subject of much discussion (*g*). By the later authorities a contract of either of these descriptions has been deemed within the prohibition of the laws relating to simony, and consequently void. They are now, however, to a certain extent, sanctioned by positive law. For by 9 Geo. IV. c. 24 (*h*), any such engagement, in writing, if made to the intent and purpose (manifested by the terms of it) that some one nominee, or one of two nominees, shall be presented, shall be valid to all intents and purposes; subject, however, to these provisions: first, that where there are two nominees, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew, of the patron; secondly, that the writing shall in all cases be deposited within two months with the registrar of the diocese, open to public inspection; and, thirdly, that the resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of the person named.

2. *Tithes* (*i*) (under which head we shall have occasion to refer also to tithe rent-charges) are, like advowsons, a species of incorporeal hereditaments (*k*); and, like them, are capable of being held either by laymen or ecclesiastics. But tithes are properly, and for the most part, in the hands of ecclesiastics only (*l*); and belong to laymen chiefly in the character of impropriators: the nature of whose rights has already been sufficiently explained in a former chapter (*m*).

Tithes [are defined to be the tenth part of the increase,

(*g*) See Dashwood *v.* Peyton, 18 Ves. 37; Jac. & Walk. 283; Bishop of London *v.* Ffyttche, 1 East, 487, (n.); Fletcher *v.* Lord Sondes, 3 Bing. 502; 5 B. & Ald. 835, S. C.

(*h*) See also 7 & 8 Geo. 4, c. 25; Burton, Comp. 416.

(*i*) From the Saxon *Teotha*, tenth, Jac. Dict. As to the recovery of tithes improperly withheld, vide post, bk. v. c. XIII.

(*k*) Vide sup. vol. I. p. 647.

(*l*) Bac. Ab. Tythes, (E).

(*m*) Vide sup. p. 20.

[yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *prædial*, as of corn, grass, hops, and wood (*o*); the second *mixed*, as of wool, milk (*p*), pigs, &c. (*q*), consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due;] nor is the tithe generally due in respect of these last at all, except so far as the particular custom of the place may authorize the claim (*r*). From the above definition it may be inferred, that whatever is [of the substance of the earth, or is not of annual increase, as stone, lime, chalk and the like,] is not in its nature titheable; nor is tithe demandable, except by force of special custom, in respect to animals *feræ naturæ*.

In our remarks on this subject we shall consider—[First, The original of the right of tithes; Secondly, In whom that right at present subsists; Lastly, who may be discharged, either totally or in part, from payment.

First. As to their original; the title of the clergy to them cannot now be put upon any divine right, though such a right certainly commenced, and, it would seem, as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the Gospel is undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be.]

The establishment of tithes in the Christian Church is generally ascribed to the fourth century (*s*), though [we cannot precisely ascertain the time when they were first

(*o*) 1 Rol. Ab. 635; 2 Inst. 649. As to the manner of taking tithe of *turnips*, see 5 & 6 Will. 4, c. 75.

(*p*) As to this tithe, vide Fisher *v.* Birrell, 2 Q. B. 239.

(*q*) 1 Rol. Ab. 635; 2 Inst. 649.

(*r*) 1 Rol. Ab. 656; 2 & 3 Edw. 6, c. 13; 7 Bro. P. C. 3; Com. Dig. Dismes, (E 3).

(*s*) See Rennell *v.* Bp. of Lincoln, 7 Barn. & Cress. 153.

[introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them, perhaps, in any written English law, is in a constitutional decree made in a synod held A.D. 786 (*t*), wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators and people: which was a very few years later than the time that Charlemagne established the payment of them in France (*u*), and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (*x*).

The next authentic mention of them is the *feodus Edwardi et Guthruni;* or the laws agreed upon between King Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between these monarchs, which may be found at large in the Anglo-Saxon laws (*y*); wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and accordingly we find the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan (*z*), about the year 930.

Secondly. We are next to consider the persons to whom tithes are due. And upon their first introduction, (as hath formerly been observed (*a*),) though every man was obliged

(*t*) Selden, c. 8, s. 2.
(*u*) A.D. 778.
(*x*) Seld. c. 6, s. 7.
(*y*) See Wilkins, Leges Anglo-Sax. p. 51.
(*z*) Wilk. ubi sup.; Ll. Athel. c. 1.
(*a*) Sup. vol. 1. p. 118.

[to pay tithes in general, yet he might give them to what priests he pleased (*b*); which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (*c*). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first, by common consent or the appointment of lords of manors, and afterwards by the written law of the land (*d*).

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John (*e*); which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences of extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the third (*f*) about the year 1200, in a decretal

(*b*) 2 Inst. 646; Slade *v.* Drake, Hob. 296.

(*c*) Seld. c. 9, s. 4.

(*d*) LL. Edgar. c. 1 and 2; Canut. c. 11.

(*e*) Seld. c. 11.

(*f*) Opera Innocent. III. tom. 2, p. 452.

[epistle sent to the archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A.D. 1179 (*g*), which only prohibited what was called the *infeudation* of tithes, or their being granted to mere laymen (*h*); whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries (*i*). This epistle, says Sir Edward Coke (*k*), bound not the lay subjects of this realm; but, being reasonable and just, it was allowed of, and so became *lex terræ*. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps, which still continue in those *portions* of tithes] (as they are called) [which the parson of one parish hath, though rarely, a right to claim in another (*l*); for it is now universally held that tithes are due of common right to the parson of the parish, unless there be a special exception; which parson of the parish, we have seen in a former chapter (*m*), may be either the actual incumbent, or else the impropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy by way of substitute to arbitrary consecration of tithes.] In impropriations, indeed, the vicar, as well as the impropriator (or rector), is generally entitled to some part of the tithes; but as between these parties, it is to be observed, that all tithes, *primâ facie* and by presumption of law, belong to the latter; except such as can be shown, by evidence, to belong to the former (*n*). Such evidence may consist, however, either of the production of a deed of endowment,

(*g*) Vide Steel *v.* Houghton, 1 H. Bl. 52.

(*h*) Decretal. l. 3, t. 30, c. 19.

(*i*) Ibid. cc. 2, 6.

(*k*) 2 Inst. 641.

(*l*) 2 Inst. 641, 653.

(*m*) Vide sup. p. 20.

(*n*) Daws *v.* Benn, 1 B. & C. 763; 2 Bligh, N. S. 83.

vesting certain tithes in the vicar; or of such proof of long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (o). It sometimes happens that an endowment is found to vest all the "small" tithes *eo nomine* in the vicar (p), which raises the question, what are *small* and what *great* tithes—to determine which, no clear line of demarcation seems ever to have been drawn: though tithes mixed and personal are universally agreed to fall always under the former denomination (q); and tithes of corn, hay and wood, are generally comprised under the latter (r).

[We observed that tithes are due to the parson of common right, unless by special exception. Let us therefore see, thirdly, who may be exempted from the payment of tithes (s).]

And here, first, we may observe, that some persons are exempt by personal privilege. [Thus the crown by its prerogative is discharged from all tithes (t). So a vicar shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being that *ecclesia decimas non solvit ecclesiæ* (u). But these privileges are not annexed to the land, but personally confined to the crown and the clergy;

(o) Jackson v. Walker, Gwill. 1231; 2 Bligh, N. S. 94, 103.

(p) Bac. Ab. Tythes, (K).

(q) Ibid.

(r) Com. Dig. Dismes, G. 1. Small tithes are sometimes called *privy* tithes. Vide Clee v. Hall, 7 C. & F. 744.

(s) This of course is meant to refer only to the ordinary methods of exemption, and not to those of a local kind. For it sometimes happens that tithes are extinguished in particular parishes by act of parliament,—such as inclosure acts. In London, an annual sum of money is paid in lieu of tithes; vide 27 Hen. 8, c. 21; 37 Hen. 8, c. 12. As to churches destroyed by the fire of London, 22 & 23 Car. 2, st. 2, c. 15, and 44 Geo. 3, c. lxxxix. As to particular parishes, 4 Geo. 4, c. cxviii.; 7 Geo. 4, c. cxvi.; 6 Geo. 4, c. clxxxvi.; 1 Geo. 4, c. lix.; 7 Geo. 4, c. liv. On the whole subject of tithes in London, see Pulling's Law of London, 254.

(t) Wright v. Wright, Cro. Eliz. 511. According to other authorities, however, the crown is not discharged, except by special prescription. Bac. Ab. Tythes (Q) 1; Hardr. 315.

(u) Blinco v. Marston, Cro. Eliz. 479; Wright v Wright, ibid. 511; Sav. 3; Moore, 910, S. C.

[for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable (*x*).]

Next, all spiritual persons or corporations,—as monasteries, abbots, bishops, and the like,—have been always capable of having their lands totally discharged of tithes by various ways (*y*), [as 1, by real composition; 2, by the pope's bull of exemption; 3, by unity of possession,—as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession; 4, by prescription,—having never been liable to tithes, by being always in spiritual hands; 5, by virtue of their order,—as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes (*z*). Though, upon the dissolution of abbeys by Henry the eighth, most of these exemptions from tithes would have fallen with them, and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands which, being in lay hands, do at present claim to be tithe-free; for if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned, this is now a good exemption.]

Again, all persons, spiritual or lay, may claim an exemption from tithes, either partial or total, by reason of a *real composition:* which is an agreement [made between the owner of the lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall, for the future, be discharged from payment of tithes, by

(*x*) Blinco *v.* Marston, Cro. Eliz. 479.

(*y*) Wright *v.* Gerrard, Hob. 309.

(*z*) Bishop of Winchester's case, 2 Rep. 44; Seld. Tithes, c. 13, s. 2.

[reason of some land or other *real* recompence given to the parson in lieu and satisfaction thereof (*a*). This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist to this day, by force of the common law. But experience showing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statute 13 Eliz. c. 10, was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches other than for three lives, or twenty-one years (*b*). So that now, by virtue of this statute, no real composition made since the thirteenth year of Elizabeth, is], in general, [good for any longer term than three lives or tweny-one years, though made by consent of the patron and ordinary.] But by 2 & 3 Will. IV. c. 100, s. 2, it is enacted, that every composition for tithes, which had then been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not been since set aside or departed from, shall be valid in law.

Moreover all persons, spiritual or lay, may claim a partial exemption from tithes by *custom* (*c*); which is where, by immemorial usage, a particular manner of tithing has been allowed, different from the payment of one-tenth of the annual increase. [And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made.]

(*a*) 2 Inst. 490; 13 Rep. 40.
(*b*) Vide sup. vol. I. p. 472.
(*c*) As to custom, vide sup. vol. I. p. 54.

Such customary mode of tithing is called a *modus decimandi*, or, more simply, a *modus*. [It is sometimes a pecuniary compensation; as twopence per acre for the tithe of land; sometimes it is a compensation in work and labour; as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him: sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity; as a couple of fowls in lieu of tithe eggs: and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient modus, the following rules must be observed: 1. It must be *certain* and *invariable* (*d*); for payment of different sums will prove it to be no modus, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the emolument of third persons only (*e*): thus a modus to repair the *church*, in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good modus, for that is an advantage to the parson (*f*). 3. It must be something *different* from the thing compounded for (*g*). One load of hay in lieu of *all* tithe hay is no good modus; for no parson would *bonâ fide* make a composition to receive less than is due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a modus for another (*h*). Thus a modus of one penny for every

(*d*) Towerson *v.* Winget, 1 Keb. 602.

(*e*) 1 Rol. Abr. 649.

(*f*) Vide sup. p. 41.

(*g*) Shepperd *v.* Penrose, 1 Lev. 179.

(*h*) Grysman *v.* Lewes, Cro. Eliz. 446; Startupp *v.* Dodderidge, Salk. 657.

[*milch* cow will discharge the tithe of milch kine, but not of *barren* cattle; for tithe is, of common right, due for both; and therefore a modus for one shall never be a discharge for the other. 5. The recompence must be in its nature as durable as the tithes discharged by it,—that is, an inheritance certain (*i*): and therefore a modus that every *inhabitant* of a house shall pay fourpence a year, in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompence will be lost. 6. The modus must not be too large; which is called a *rank* modus: as if the real value of the tithes be 60*l.* *per annum*, and a modus is suggested of 40*l.*, this modus will not be established; though one of 40*s.* might have been valid (*k*). Indeed, properly speaking, the doctrine of *rankness* in a modus is a mere rule of evidence drawn from the improbability of the fact, rather than a rule of law (*l*). For in these cases of customary moduses, it is supposed that an original real composition was antiently made; which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained, by the law, to commence from the beginning of the reign of Richard the first (*m*); and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present. Wherefore as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the modus set up is so rank and large as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this modus is (in point of evidence) *felo de se*, and destroys itself. For as it would be destroyed by any direct

(*i*) 2 P. Wms. 462.

(*k*) Startupp *v.* Dodderidge, 11 Mod. 60.

(*l*) Pyke *v.* Dowling, H.T. 19 Geo. 3, C. B.

(*m*) 2 Inst. 238, 239; vide sup. vol. I. p. 58.

[evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.]

Lastly. All persons, spiritual or lay, may, in certain cases, claim exemption from tithes, in respect of *long usage;* that is, such usage as can be shown to have lasted for a certain period of time, even though it may have fallen short of immemorial duration. This sort of exemption is given by a late statute, and it may either be by way of modus, (in which case the discharge is partial only,) or may be founded on an usage to pay no tithe whatever. But in either case its principle is new; for the common law recognized no modus that had not existed *immemorially;* and allowed no *total* discharge from tithes by force of any custom or prescription whatever, except in the case of spiritual persons before mentioned; maintaining inviolably the maxim, that, [in lay hands, *modus de non decimando non valet* (*n*).]

The statute above referred to is the 2 & 3 Will. IV. c. 100 (*o*), whereby it is provided, that when tithe is demanded by any lay person, not being a corporation sole, or by any corporation aggregate,—any modus or discharge set up in answer to such claim shall be deemed valid, upon evidence showing an usage in support of it for thirty years; unless it can be met by evidence that such usage has been by virtue of some agreement in writing; or that before the thirty years the usage was different: and a modus or discharge shall in such case be deemed absolutely valid, upon evidence showing an usage for as much as sixty years in support of it; unless it be proved to have been by virtue

(*n*) Wright *v.* Wright, Cro. Eliz. 511.

(*o*) Amended by 3 & 4 Will. 4, c. 83. See the following cases which have arisen under these acts: Thorpe *v.* Mattingley, 5 Mee. & W. 302; Earl of Stamford *v.* Dunbar, 13 Mee. & W. 822; Knight *v.* Waterford (Marquis of), 15 Mee. & W. 419; Fellowes *v.* Clay, 4 Q. B. 313; Salkeld *v.* Johnson, 2 C. B. 749; 2 Exch. 256; Toymbee *v.* Brown, 3 Exch. 117; Young *v.* Clare Hall, 17 Q. B. 429.

of some agreement in writing. And further, that when tithe is demanded by any bishop, parson, or other corporation sole, any claim of modus or discharge shall be valid and indefeasible upon evidence of usage during the whole time that two persons in succession shall have held the benefice, and for three years after the institution of a third incumbent; unless it shall be proved that such usage was by some agreement in writing: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such usage not only during the whole of such time, but also during such further period as shall, with such time, be sufficient to make up the full period of sixty years, and the further period of three years aforesaid.

Such, in a general point of view, is the state of the law with respect to tithes. But a system is now in progress (and has nearly reached its final result,) for commutation of this species of property throughout the kingdom into rent-charge: and to this subject it is now time to call the reader's attention.

The institution of tithes, though venerable from its scriptural origin and its antiquity, and though entitled, so far as the principle of making a competent provision for the ministers of religion is concerned, to universal approbation, is nevertheless, in its specific form, odious to the people, and unsatisfactory to the political economist. A tax, consisting of a fixed proportion of the gross produce, is open to this objection; that it takes advantage of increased fertility, while it makes no allowance for increased expenditure; and thus tends to check the spirit of agricultural improvement. It is obvious, too, that the produce of the soil cannot be collected in kind, without much waste and expense to the tithe-owner; nor without the danger of engendering animosities between him and his flock. It is, however, on the other hand, of not less manifest importance to the Church, that the legal provision for its members should be such as to secure to them, upon some

steady basis, a competent portion of the necessaries of life: and to make them independent of any fluctuations in the value of money. It is therefore with great wisdom that parliament has lately consented to the adoption of a plan for commuting the tithes of every parish into a rent-charge, the amount of which is to be adjusted annually, according to the average price of corn.

This measure has been carried into effect by the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, and the various acts since passed for its amendment (*p*). They establish a board of commissioners, under the title of "The Tithe Commissioners for England and Wales" (*q*); and provide (in general) that the commutation may be effected in two ways; either by a voluntary parochial agreement, provided it be entered into by a certain proportion of the parties interested (*r*), and confirmed by the commissioners (*s*); or by the compulsory award of the commissioners: for which latter purpose they are required to take as the basis of the commutation, (but with power to a certain extent, and in certain cases, to depart from it,) the clear average value of the tithes of the parish; or of the composition payable for the same, where they have been compounded for; for the period of seven years, ending Christmas, 1835 (*t*). The value so voluntarily agreed upon, or awarded by the commissioners, (as the case may be,) is to be considered as the amount of the total rent-charge to be paid in respect of the

(*p*) See 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104. The following are some of the cases which have arisen upon the construction of the Tithe Commutation Acts: Barker *v.* The Tithe Commissioners, 9 Mee. & W. 130; S. C. 11 Mee. & W. 320; In re Tithe Commissioners, 1 Dowl. N.S. 810; Fisher *v.* Berrell, ibid. 565; R. *v.* Tithe Commissioners, 15 Q. B. 620.

(*q*) 6 & 7 Will. 4, c. 71, s. 2. The Board of Tithe Commissioners has been since consolidated with that of the Inclosure Commissioners and that of the Copyhold Commissioners. Vide sup. vol. I. p. 641, n. (*i*).

(*r*) 6 & 7 Will. 4, c. 71, s. 17.

(*s*) Sect. 27. See Re Appledore Tithe Commission, 8 Q. B. 139; Matthews *v.* Leapingwell, 3 C. B. 912; Bunbury *v.* Fuller, 9 Exch. 111.

(*t*) 6 & 7 Will. 4, c. 71, s. 37.

tithes in that parish (*u*); and is to be afterwards apportioned among the lands of the parish, having regard to their average titheable produce and productive quality (*x*): and, after the apportionment shall have been confirmed, such lands are to be absolutely discharged from the payment of all tithes; and instead thereof shall be subject to their portion of the rent-charge: which shall be thenceforth payable to the former tithe-owner, by two half-yearly payments (*y*). The amount of these payments is to fluctuate according to the price of corn; and the machinery for that purpose is as follows. It is provided, that, immediately after the passing of the act, and also in January every year, an advertisement shall be inserted by authority in the London Gazette; stating the average price of wheat, barley, and oats, for seven years ending on Thursday before Christmas then next preceding (*z*): and that every rent-charge shall be deemed of the value of so many bushels of wheat, barley, and oats, in equal quantities, as the same would have been competent to purchase according to the prices inserted in the first advertisement (*a*); and, that after every first of January, it shall vary,—so as always to consist of the price of the same quantities, according to the advertisement then next preceding (*b*).

The rent-charge created under these Acts differs from rent-charges in general (*c*), not only in the variableness of its amount, but in another important particular; for in these, not only the land of the party charged, but his

(*u*) 6 & 7 Will. 4, c. 71, s. 50.

(*x*) Sects. 33, 54.

(*y*) Sect. 67.

(*z*) Sect. 56.

(*a*) Sect. 57.

(*b*) Sect. 67. We may remark here, that unless by special provision to be inserted in some parochial agreement, and specially approved by the commissioners, the acts do not extend to the tithes of *fish*, or to *personal* tithes (in general), or to *mineral* tithes, or to payments in lieu of tithes in *London*, or rent-charges in lieu of tithes under any custom or private act, or any tithes commuted or extinguished under any former act,—sect. 90. (See also 2 & 3 Vict. c. 62, s. 9.)

(*c*) As to rent-charges in general, vide sup. vol. I. p. 674.

person, is usually liable; but as to a tithe rent-charge, it is expressly provided (*d*), that no person whatever shall be personally liable to the payment. The remedy in general where the rent-charge is in arrear for twenty-one days, is only by distress on the land, as in the case of landlord and tenant (*e*); but if it be in arrear for forty days, and there be no sufficient distress, a writ may then be obtained from one of the judges at Westminster, to assess the arrears: after which the owner of the rent-charge may sue out a writ of execution for taking possession of the lands and holding them till his debt and costs be fully satisfied (*f*). But it is provided that neither the distress nor writ of execution shall be taken out for more than two years' arrears at any one time (*g*). These rent-charges, it may also be remarked, are made subject to all parliamentary, parochial, and other rates and charges, to which the tithes commuted have theretofore been subject (*h*); and such rates and charges are to be assessed in the first instance upon the occupier of the lands; who may, after paying them, deduct the amount from the rent next payable to his landlord, and the landlord may, in his turn, recover that amount from the owner of the rent-charge (*i*). But in some cases lands may obtain an exemption under the Commutation Acts, from all liability either to tithe or rent-

(*d*) 6 & 7 Will. 4, c. 71, s. 67. See Griffinhoofe *v.* Daubuz, 4 Ell. & Bl. 230.

(*e*) 6 & 7 Will. 4, c. 71, s. 81. As to costs on distraining for a rent-charge, see Newnham *v.* Bever, 8 C. B. 560. When apportioned on lands taken by a railway, distress may be had on the goods of the company wherever situated. (7 & 8 Vict. c. 83, s. 22.) When an outgoing tenant has quitted, leaving tithe rent-charge unpaid, the succeeding tenant or landlord may pay it to prevent a distress, and may charge him with the amount. (14 & 15 Vict. c. 25, s. 4.)

(*f*) 6 & 7 Will. 4, c. 71, s. 82. See In re Hammersmith Rent-charge, 4 Exch. 87.

(*g*) 6 & 7 Will. 4, c. 71, ss. 81, 82.

(*h*) Sect. 69.

(*i*) Sect. 70. As to the assessment, &c. of *property tax* on these rent-charges, vide 5 & 6 Vict. c. 35, sched. A. No. IV. As to the assessment of tithe rent-charges to rates levied for watching and lighting, under 3 & 4 Will. 4. c. 90, or under the "Public Health Act," see 14 & 15 Vict. c. 50.

charge. For to the extent of twenty acres in the same parish, land is allowed to be given to the tithe-owner as an equivalent (*k*); and any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge, may dispose of the same so that it shall be merged in the inheritance of the lands charged (*l*).

The Commutation Acts provide, that any person having any interest in any tithes shall have the same claim upon the substituted rent-charge (*m*); and that every estate in the rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted; and that when any lands were exempted from tithe while in the occupation of the owner, by reason of being glebe, or having been heretofore parcel of the possessions of any privileged order,—the same lands shall be in like manner exempted from the payment of the rent-charge while in the occupation of the owner thereof; and that where by any act of parliament tithes are authorized to be sold, exchanged, or applied in any way, the same powers shall apply to the rent-charge (*n*). It follows, therefore, that notwithstanding the new system of commutation, the former tithe law will in some respects always retain its importance, and require to be noticed in our law books. But, on the other hand, when that commutation shall have extended to every parish in the realm, many branches of the former law will for all practical purposes be superseded; and in this may be included (besides many others which we have thought it allowable to pass by) the important and difficult subjects of modus and total exemption, of which we have above endeavoured to give some general idea. For it is provided by the Commutation Acts, that if any question shall arise as to any composition real,

(*k*) 6 & 7 Will. 4, c. 71, ss. 29, 62, 68; 2 & 3 Vict. c. 62, ss. 19, 20, 21; 5 & 6 Vict. c. 54, s. 6; et vide ibid. sect. 7.

(*l*) 6 & 7 Will. 4, c. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62.

(*m*) See Tasker v. Bullman, 3 Exch. 351.

(*n*) 6 & 7 Will. 4, c. 71, s. 71. As to partial exemption, see also 2 & 3 Vict. c. 62, ss. 11, 12; 3 & 4 Vict. c. 15, s. 14.

modus, or exemption from tithe, in respect of any of the lands or produce thereof in any parish, such question shall be definitively settled in the manner therein provided; and due allowance made in the parochial agreement, or award of the commissioners, (as the case may be,) for every modus or exemption that shall be so established (o).

II. As to the estates which ecclesiastical persons may have in the several descriptions of property above enumerated, it is to be remarked, that their case differs from that of ordinary proprietors, in several particulars. A dean and chapter always constitute a corporation aggregate; and every bishop, parson, vicar, and the like, a corporation sole: and, consequently, they take lands and hereditaments, when granted in perpetuity, to hold to them and their *successors*, instead of their *heirs* (p). And in connection with this is the distinction to be found in the books, that if land be granted to a corporation aggregate, they take a fee simple without the word *successors;* but if to a bishop, parson, or the like, then the word *successors*, (except indeed in case of the antient tenure in frankalmoign,) must be added to give him a perpetuity in right of his church. Indeed, the estate of a parson or vicar, even when perpetual as regards his church, is considered for most purposes, as regards himself personally, an estate for life only, with the fee simple in abeyance; though for other purposes it is said to amount to a fee simple qualified (q). But if a bishop or dean, or dean and chapter, have lands in perpetuity in right of their churches, they are always described in law, as seised in their demesne as of fee (r). It is also held, that ecclesiastical persons, on account of their corporate character, cannot be seised, as such, in tail; though they may

(o) 6 & 7 Will. 4, c. 71, ss. 21, 24, 44, 45; Barker *v.* Tithe Commissioners, 9 Mee. & W. 129; S. C. 11 Mee. & W. 320.

(p) 3 Inst. 202; Co. Litt. 300; Wats. C. L. 372. As to corporations aggregate and sole, vide sup. vol. I. pp. 356, 465, et post, pt. III. c. I.

(q) Co. Litt. 341 d.

(r) Wats. C. L. 373.

have an estate determinable upon the death of a person without issue. And for the same reason they cannot in general, (and subject to the large exceptions introduced by modern statutes on this subject,) hold the lands that are granted to them, without obtaining a licence of mortmain (*s*).

III. As to the power of alienation which ecclesiastical persons are competent to exercise.

At common law, though an ordinary tenant for life could make no alienation which would bind longer than while he himself lived, (an incapacity to which he is still in general (*t*) subject,) [yet some tenants for life, where the fee simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee,) make leases of equal duration with those granted by tenants in fee simple, such as parsons and vicars, with consent of the patron and ordinary (*u*). So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control.] Thus such leases or estates might have been made by archbishops and bishops, with confirmation of the dean and chapter (*v*); and

(*s*) Wats. C. L. 373, 374. As to the law of mortmain, vide sup. vol. I. p. 453—461. Among the statutes which have introduced exceptions from that law, are the following relative to the taking and holding of lands by *ecclesiastical* corporations in certain cases: 17 Car. 2, c. 3, ss. 7, 8 (revived by 6 & 7 Vict. c. 37); 29 Car. 2, c. 8; 2 & 3 Ann. c. 11; 5 Ann. c. 24, s. 4; 1 Geo. 1, sess. 2, c. 10, ss. 4, 21; 17 Geo. 3, c. 53; 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 56 Geo. 3, c. 52; 7 Geo. 4, c. 66; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107, s. 14; 2 & 3 Vict. c. 49; 3 & 4 Vict. cc. 20, 60; 4 & 5 Vict. c. 39; 6 & 7 Vict. c. 37, s. 12; 17 & 18 Vict. c. 84, ss. 1, 2, 3; 19 & 20 Vict. c. 104, s. 23.

(*t*) See however the exception now introduced by 19 & 20 Vict. c. 120, sup. vol. I. p. 258.

(*u*) Co. Litt. 44; Bac. Ab. Leases, (E.); Vivian *v.* Blomberg, 3 Bing. N. C. 311.

(*v*) Dean of Ely *v.* Stewart, 2 Atk. 45; Wats. C. L. c. 44.

by deans, with the confirmation of the bishop and chapter. [And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever.] Whereas now by several statutes the ability of ecclesiastical persons in this respect is in one case enlarged, and, in several others, restrained. [We will take a view of them all, in order of time (*w*).]

And, first, the *enabling* statute 32 Hen. VIII. c. 28 (*x*), empowers [all persons seised of an estate of fee simple in right of their churches (which extends not to parsons or vicars)] to make leases for twenty-one years or three lives from the making, or for any shorter term; and such leases shall, [without the concurrence of any other person, bind their successors. But then there must be many requisites observed which the statute specifies, otherwise such leases are not binding.] These requisites are as follows:—1. The lease must be by indenture, and not by deed-poll or parol. 2. If there be any old lease in being it must be expired, surrendered or ended within one year after the making of the new one. 3. It must not be made without impeachment of waste. 4. It must be of land which has most commonly been let for twenty years past; [so that if it has been let for above half the time, or eleven years out of the twenty, either for life, for years, at will, or by copy of court-roll, it is sufficient.] 5. It must be either for twenty-one

(*w*) See Bac. Abr. tit. *Leases and Terms of Years*, supposed to be from the pen of Chief Baron Gilbert, where this subject is learnedly and copiously discussed; et vide Doe *d.* Brammall *v.* Collinge, 7 C. B. 939.

(*x*) This statute extended to other descriptions of persons besides those seised in right of their churches. By its provisions a *tenant in tail* might make leases for twenty-one years or three lives, so as to bind his issue in tail, though not those in remainder or reversion; and a *husband, seised in right of his wife in fee simple or fee tail*, might make leases, provided the wife joined in them so as to bind her and her issue thereby. But by 19 & 20 Vict. c. 120, ss. 32, 35, the statute 32 Hen. 8, c. 28, is now repealed, except so far as relates to leases made by persons having an estate in right of their churches; and new enabling provisions are made with respect to other descriptions of persons, including tenants in tail and persons having estates *jure uxoris*.

years or three lives, (at most,) from the day of the making thereof. 6. It must reserve to the lessor and his successors so much rent, (or more,) as has been customarily had for the land within twenty years next before the lease (*y*).

[Next follows in order of time the *disabling* or *restraining* statute, 1 Eliz. c. 19 (made entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops, (which include even those confirmed by the dean and chapter, the which, however long or unreasonable, were good at common law,) other than for the term of twenty-one years or three lives from the making, or without reserving the old annual rent (or more),—shall be void. But by a saving expressly made, this statute of the first year of Elizabeth did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which for the future, the statute 1 Jac. I. c. 3 (*z*), extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Next comes the statute 13 Eliz. c. 10 (explained and enforced by the statutes 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, and 43 Eliz. c. 29), which extends the restrictions, laid by the 1 Eliz. c. 19, on bishops] to colleges, cathedrals, or collegiate churches, hospitals, parsons and vicars, and other holders of spiritual livings. From laying all which together, and examining the particular provisions of the before-mentioned statutes, we may collect that (subject to the relaxations introduced by some recent statutes to be presently noticed) all such corporations sole or aggregate as

(*y*) Among the requisites formerly was that the lease must be of corporeal hereditaments, and not such as lie merely in grant; but this was dispensed with by 5 Geo. 3, c. 17.

(*z*) See also 21 Jac. 1, c. 1.

above enumerated (*a*) are restrained from making any grants or leases of their lands, unless under the following regulations. [1. They must not exceed,] except in the case of houses in corporations or market towns, [twenty-one years, or three lives, from the making;] but may be for a shorter time. 2. [They must be of lands commonly letten for twenty years past. 3. The accustomed rent, or more, must be yearly reserved thereon (*b*). 4. Houses in corporations or market towns, may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair; and they may also be aliened in fee simple, for lands of equal value in recompence. 5. Where there is an old lease in being, no new lease shall in general be made, unless where the old one will expire or shall be surrendered or otherwise ended within three years. 6. No lease (by the equity of the statutes) shall be made without impeachment of waste (*c*).

Concerning these restrictive statutes, there are two observations to be made; first, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years, or three lives, even *with* the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent (*d*). Secondly, that though leases contrary to these Acts are declared void, yet they are good *against the lessor* during his life, if he be a sole

(*a*) The expression of Blackstone in this place is "all colleges, cathe- "drals, and other ecclesiastical or "eleemosynary corporations, and all "parsons and vicars." (2 Bl. Com. p. 32.)

(*b*) As to this requisite, (see Doe *v.* Lock, 2 Ad. & El. 705.

(*c*) As to these statutes, see also 39 & 40 Geo. 3, c. 41, by which they are explained and amended, as regards the condition as to the "accustomed rent."

(*d*) Co. Litt. 44.

[corporation: and are also good against an aggregate corporation, so long as the *head* of it lives, who is presumed to be the most concerned in interest (*e*). For the Acts were intended for the benefit of the successor only; and no man shall make an advantage of his own wrong (*f*).

There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6; which directs that one-third of the old rent then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s*. 8*d*., or a quarter of malt for every 5*s*.; or that the lessees should pay for the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market day before the rent became due. This is said (*g*) to have been an invention of Lord Treasurer Burleigh, and Sir Thomas Smith, then principal Secretary of State; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new found Indies (*h*) (which effects were likely to increase to a greater degree), devised this method for upholding the revenues of colleges.] And in proof of the foresight and penetration evinced by them in this respect, it is remarked by Blackstone that the money arising from the corn rents, though originally but a third of the whole, was in his time almost double, *communibus annis*, of what arose from the other two-thirds (*i*).

Such continued, from the reign of Queen Elizabeth to

(*e*) As to the *head* of a corporation aggregate, vide post, pt. III. c. I.

(*f*) Co. Litt. 45.

(*g*) Strype's Annals of Eliz.

(*h*) Vide sup. vol. II. p. 530.

(*i*) 2 Bl. Com. p. 322. In reference to this statement of Blackstone, it is remarked by Adam Smith, that, since the reign of Philip and Mary, the denomination of the English coin had undergone little or no alteration, and the same number of pounds, shillings and pence had contained very nearly the same quantity of pure silver; so that the degradation in the value of the money rents of colleges had arisen altogether from the degradation in the value of silver. (Wealth of Nations, bk. i., c. v.)

that of King William the fourth, to be the state of the law in this matter, subject only to partial relaxations from time to time introduced by various acts of parliament, enabling ecclesiastical and eleemosynary corporations to make, for certain purposes of public importance, especially the purpose of augmenting the poorer benefices, certain dispositions of property held in their corporate capacity,—such as in general, and under ordinary circumstances, it would have been beyond their power to make (*j*). But in the reign last mentioned, a new series of more general legislation on the subject of grants or leases by ecclesiastical persons, may be said to have commenced, involving in one respect additional restriction, and in others some relief from restrictions before existing.

First, by 6 & 7 Will. IV. c. 20 (*k*), relative to the *renewal* of church leases (*l*), it is provided, that no archbishop or bishop, ecclesiastical corporation sole or aggregate, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of their lands or hereditaments, by way of renewal of a lease previously granted for two or more lives, until one or more of the persons for whose lives it was granted, shall die: and then only for the surviving life or lives, and such new life or lives as shall serve to make up the number of lives, not exceeding three, for which the first lease was granted: that where such previous lease was for forty, thirty, or twenty-one year, the renewed lease shall not he granted until fourteen, ten, or seven years of the first term shall have

(*j*) Among the statutes prior to 6 & 7 Will. 4, c. 20, are 17 Car. 2, c. 3, s. 7 (revived by 6 Vict. c. 37); 29 Car. 2, c. 8 (extended by 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107, and 17 & 18 Vict. c. 84); 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 55 Geo. 3, c. 147; 1 Geo. 4, c. 6; 5 Geo. 4, c. 89; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66.

(*k*) Explained and amended by 6 & 7 Will. 4, c. 64.

(*l*) For the former state of the law as to the grant of a new lease before that in being is expired, or, as they are usually termed *concurrent* leases, vide Bac. Abr. Leases (E), rule 3; Vivian *v.* Blomberg, 3 Bing. N. C. 311.

expired respectively: and that where it was for any term of years whatever, no renewal thereof shall be granted for any life or lives. The act, however, provides that when it shall be certified by such parties as therein mentioned, that for ten years last before the act, it had been the usual practice (such practice having, in the case of a corporation sole, commenced prior to the time of the person for the time being representing the corporation), to renew such leases for forty, thirty, or twenty-one years, at shorter periods than fourteen, ten or seven years respectively,—a renewed lease may be granted conformably to such usual practice (*m*): and also that nothing in the act shall prevent granting a renewed lease by way of exchange of any life or lives in being, for which a lease shall have been granted,—in case such exchange shall be approved by such authority as in the act specified (*n*); nor shall prevent a lease from being granted, with a view to confirm any title or otherwise, for the life or lives of the same person or persons, or the survivors or survivor of them; or for the same term of years as the lease last granted (*o*).

Next, it is provided by 5 & 6 Vict. c. 27 (an act to enable incumbents to demise the lands belonging to their benefices on farming leases), that it shall be lawful for an incumbent, with consent of the patron and bishop, by deed to lease, for a term not exceeding fourteen years, any part of the glebe lands, or other lands, belonging to the benefice, to take effect in possession and not in reversion; provided that there be a reservation quarterly, of the best rent that can be gotten,—that no fine or foregift be taken for the same,—that no lessee be made dispunishable for waste, —and that the lease contain such covenants as to cultivation, management, and other particulars, as the act particularly specifies (*p*). It is also provided, that where covenants are taken for a particularly expensive mode of

(*m*) 6 & 7 Will. 4, c. 20, s. 3.
(*n*) Sect. 5.
(*o*) Sect. 7.
(*p*) 5 & 6 Vict. c. 27, s. 1.

cultivation, the term may be extended to twenty years (*q*); but that before any lease shall be granted, a competent surveyor shall be appointed by the bishop, patron, and incumbent, who shall certify that the lands and buildings are proper to be leased under the provisions of the act, and otherwise report upon the circumstances of the case (*r*); and that no lease shall be valid unless there be reserved out of the same, the house of residence, and at least ten acres of the land lying within five miles of it, and situate most conveniently for actual occupation (*s*).

It is also enacted by 5 & 6 Vict. c. 108 (passed to enable ecclesiastical persons to grant long leases for building, repairs, or other improvements), that any ecclesiastical corporation, aggregate or sole, (except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and also, except any ecclesiastical hospital or the master thereof,) may, with consent of the corporate body, of which we shall have occasion to speak hereafter, called the "Ecclesiastical Commissioners for England (*t*)," (to which, where the lessor is incumbent of a benefice, the consent of the patron also must be added,) demise, by deed, the corporate lands or houses for any term not exceeding ninety-nine years, to take effect in possession and not in reversion, to any person willing to improve or repair the same: but so as there be reserved the best yearly rent, payable half-yearly or oftener; and so as the lease be made without fine or foregift, and contain such covenants as in the act particularly specified. It is also provided, that on the grant of such leases, a small rent may be reserved during the six first years, with an increased rent afterwards (*u*); but no such lease is to comprise the usual house of residence, its outbuildings, or pleasure grounds (*v*). The act also contains a

(*q*) 5 & 6 Vict. c. 27, s. 1.

(*r*) Sect. 3.

(*s*) Sect. 2.

(*t*) As to these commissioners, vide post, p. 114.

(*u*) 5 & 6 Vict. c. 108, s. 2.

(*v*) Sect. 9.

similar power of leasing, (but for the term of *sixty* years only,) with respect to watercourses, way leaves, railroads, and other like easements upon or over the property belonging to such ecclesiastical persons (*w*); and also with respect to their mines, minerals, or quarries (*x*). But it directs that any increase in the annual value of benefices and preferments to be obtained by means of any leases thereby authorized, or a portion of such increase, (as the case may be,) shall upon the next vacancy thereof be paid over to the Ecclesiastical commissioners, to be applied in making additional provision for the cure of souls, according to the statutes in that behalf provided (*y*). The Act also provides that, before any lease shall be granted under its authority, a competent surveyor shall be appointed by the Ecclesiastical commissioners, with consent of the intended lessor, who shall make such report or certificate as to the intended plan as shall be deemed necessary (*z*). Provisions are also contained as to the surrender of existing leases and underleases, for the purpose of granting a new lease under the Act (*a*). And it is enacted, that no ecclesiastical person or his representatives shall be liable to the successor on account of any *dilapidations* which may occur in houses or buildings, while the same are held under a lease granted by the Act, for building or repairing purposes (*b*). This Act, however, is made without prejudice to any right that ecclesiastical persons have under the former law to grant or lease, whether by renewal or otherwise; save and except that in every lease hereafter granted under the former law, of lands or houses which shall have been previously leased under this Act,—there shall be always reserved the best improved rent (payable half-yearly or oftener), without taking any fine or foregift for the same (*c*).

(*w*) 5 & 6 Vict. c. 108, s. 4.

(*x*) Sect. 6. See Doe *d.* Brammall *v.* Collinge, 7 C. B. 954.

(*y*) 5 & 6 Vict. c. 108, ss. 10—15.

(*z*) Sect. 18.

(*a*) Sects. 16, 17.

(*b*) Sect. 19.

(*c*) Sect. 8.

Finally, by 14 & 15 Vict. c. 104 (*d*), any ecclesiastical corporation, sole or aggregate, (not including under that expression, however, any college or hospital, or any parson, vicar, or perpetual curate, or other incumbent, of any benefice,) may, with the approval in writing of that committee of the Ecclesiastical commissioners, called the Church Estate Commissioners (*e*), sell to any of their lessees the reversion, estate, and interest of the corporation, in all or any of the lands comprised in the lease, or enfranchise any copyhold or customary land held of any manor belonging to the corporation; or effect exchanges with any of their lessees; or purchase the estate and interest of any such lessees in any lands belonging to the corporation, or of any holder of copyhold or customary land of such manor (*f*). It is however provided, that the Church Estate Commissioners shall pay due regard to the just and reasonable claims of the present holders of lands under lease or otherwise, arising from the long-continued practice of renewal (*g*).

In addition to the restrictions on alienation which have been mentioned,—the object of which is the protection of the successor,—ecclesiastical persons (having the cure of souls (*h*)) are restrained from *charging* their benefices so as to render them liable to the payment of pension or profit

(*d*) Continued, explained and amended by 16 & 17 Vict. c. 67, ss. 1, 4, &c.; 17 & 18 Vict. c. 116; 19 & 20 Vict. c. 74; and 20 & 21 Vict. c. 74. See also, for further relaxations of the law against alienation by ecclesiastical persons, the Acts cited vol. I., p. 473; and 20 & 21 Vict. c. 13.

(*e*) As to these commissioners, vide post, p. 114, n. (*l*).

(*f*) The Act contains a proviso, that where, under its provisions, the estate or interest of any ecclesiastical corporation in any *tithes* or *tithe rent-charges*, or any hereditaments allotted or assigned in lieu of tithes, is proposed to be sold or given in exchange,—the Church Estate Commissioners, before they approve, must bring the wants and circumstances of the places in which such tithes arise, or have arisen, under the notice of the Ecclesiastical Commissioners for England; and, if such commissioners so direct, shall, as a condition of their approval, require such augmentation or provision to be made in respect of the spiritual wants of the place out of the proceeds, as shall be fit. (14 & 15 Vict. c. 104, s. 1.)

(*g*) See also 17 & 18 Vict. c. 116, s. 5, as to the method of ascertaining such right of renewal, in the case of *copyholders*.

(*h*) Bac. Abr. Leases (F).

thereout, even in their own time; a provision intended for the protection of the incumbents themselves. This is by force of the 13 Eliz. c. 20, a statute that was once repealed by the 43 Geo. III. c. 84, s. 10, but which has been since revived by 57 Geo. III. c. 99 (i). Under this statute of Elizabeth, it has been held that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void (k); and that not only a direct charge, but an agreement to charge a living, falls under the same consideration (l).

Having thus endeavoured to explain in some measure the state of the law with respect to the endowments and provisions of the Church, properly so called, (a subject too large and intricate to admit of fuller exposition within the limits of a work like the present,) we shall conclude with some notice of certain profits of little comparative importance; which, as forming a part (however trivial), of the revenues of the clergy, ought to be considered in connection with the subject of the chapter. We allude to those fees and dues which go by the name of *surplice fees* (being payable on baptisms, burials, marriages, and the like); and to Easter offerings, and mortuaries: all which are mentioned generally in our books by the name of *oblations*, and are of great antiquity. Indeed, it is said that voluntary oblations, (from which these probably emanated,) once formed, with the produce of such lands as had been voluntarily bestowed, the whole revenue of the Church; until in the fourth century it was enriched with tithes (m).

(i) Shaw v. Pritchard, 10 B & C. 241. The 57 Geo. 3, c. 99, has been itself in turn repealed by 1 & 2 Vict. c. 106, but without affecting the revival of 13 Eliz. c. 20.

(k) Shaw v. Pritchard, ubi sup.

(l) As to this statute see Flight v. Salter, 1 B. & Ad. 673; Newland v. Watkin, 9 Bing. 113; Alchin v. Hopkins, 1 Bing. N. C. 99; Saltmarshe v. Hewett, 1 Ad. & El. 812; Walthen v. Crofts, 20 L. J. (Exch.) 257; Hawkins v. Gathercole, 24 L. J. (Ch.) 332.

(m) Jac. Law Dict. Oblations; Rennell v. Bishop of Lincoln, 7 Barn. & Cress. 153.

With respect to the surplice fees, it is said that none are due to the minister as of common right, but that they depend upon special custom only (*n*); while as to Easter-offerings, on the other hand, it is laid down that they are due of common right; and that at twopence per head, (unless it has been usual to pay more,) to him who exercises the spiritual function (*o*). However this may be, the liability to pay oblations generally, is recognized by the statute law. For by 2 & 3 Edw. VI. c. 13, all, who, by the laws and customs of the realm, ought to pay offerings, shall yearly pay them to the parson or vicar of the parish at the four most usual offering days; or otherwise at Easter: and by 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, every person shall henceforth pay all offerings, oblations, and obventions (*p*) to the several rectors, vicars, and others to whom they are due; and they are made recoverable before two justices of the peace, where their amount does not exceed 10*l.*; or, (where due from Quakers,) 50*l.* (*q*). Moreover in new churches and chapels built under the Church Building Acts (*r*), and the "New Parishes Acts" (*s*), (of which we shall presently speak more at large), the payment both of fees and offerings to the minister and clerk respectively, is specially regulated and secured.

As to *mortuaries*, (on which the learning is more copious,) they are stated by Blackstone to be [a sort of ecclesiastical

(*n*) 3 Bl. Com. 90; Com. Dig. Dismes (B. 1); Burleaux *v.* Lancaster, 1 Salk. 332; Andrews *v.* Cawthorne, Willes, 536; Littlewood *v.* Williams, 6 Taunt. 277; Gilbert *v.* Buzzard, 3 Phill. 360; Spry *v.* Gallop, 16 Mee. & W. 716.

(*o*) Com. Dig. Dismes (B. 1); Laurence *v.* Jones, Bunb. 173; Egerton *v.* Still, Bunb. 128.

(*p*) It has been held that "mortuaries" do not come within the provisions of 7 & 8 Will. 3, c. 6. (Ayrton *v.* Abbott, 14 Q. B. 1.)

(*q*) By the same statutes, and by 5 & 6 Will. 4, c. 74, and 4 & 5 Vict. c. 36, offerings and other ecclesiastical dues, cannot be recovered in the superior courts, or in the ecclesiastical courts, where the amount does not exceed 10*l.* (or in the case of Quakers, 50*l.*), and no matter of title comes in question.

(*r*) See 59 Geo. 3, c. 134, s. 11; 1 & 2 Will. 4, c. 38, s. 14; 14 & 15 Vict. c. 97, ss. 2—6, 18.

(*s*) See 6 & 7 Vict. c. 37, s. 15; 19 & 20 Vict. c. 104, s. 12.

[heriots (*t*), being a customary (*u*) gift claimed by and due to the minister, in very many parishes, on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended (as Lyndewoode informs us, from a constitution of Archbishop Langham), as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after (*x*) the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary (*y*). And therefore in the laws of King Canute (*z*) this mortuary is called soul-scot (ꞅaplꞅceat), or *symbolum animæ* (*a*).

It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse, when it came to be buried; and thence it is sometimes called a *corse-present*; a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the third, we find it riveted into an established custom: inso-

(*t*) 2 Bl. Com. p. 425. As to heriots, vide sup. vol. I. p. 627. It is to be observed that "mortuaries" are not the same as "burial fees." Willes, 538, (n.) And see the case of Ayrton *v.* Abbott, above cited.

(*u*) None is due of common right, but by custom only. 2 Inst. 491.

(*x*) Co. Litt. 185.

(*y*) "*Si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seu contradictione quâlibet, pro recompensatione subtractationis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ.*"—Provinc. l. 1, tit. 3.

(*z*) C. 13.

(*a*) "In pursuance of the same "principle," says Blackstone, vol. ii. p. 425, "by the laws of Venice, "where no personal tithes have been "paid during the life of the party, "they are paid at his death, out of "his merchandize, jewels, and other "moveables (Panormitan. ad De- "cretal. l. 3, t. 20, c. 32)." He also remarks, that previously to the year 1409, bya similar policy in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of Christian burial; or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church in case he had made a will. And he cites Montesquieu, Sp. L. b. 28, c. 41.

[much that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea, ecclesiam de aliâ meliori.*" But yet this custom was different in different places, "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci* (*b*)." This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompence given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the Archdeaconry of Chester, a custom also prevailed, that the bishop, who was also archdeacon, should have at the death of every clergyman dying therein his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*c*). But by statute 28 Geo. II. c. 6, this mortuary is directed to cease, and the act settled upon the bishop, an equivalent in its room.]

[The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries or corse-presents to parsons of any parish shall be taken in the following manner; unless where by custom less or none at all is due; viz., for every person who does not leave goods to the value of ten marks, nothing: for every persons who leaves goods to the value of ten marks and under thirty pounds, 3*s*. 4*d*.; if above thirty pounds and under forty pounds, 6*s*. 8*d*.; if above forty pounds, of

(*b*) Bract. l. 2, c. 26; Flet. l. 2, c. 57.

(*c*) Hinde *v*. Bishop of Chester, Cro. Car. 237.

[what value soever they may be, 10*s*. and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any *feme covert;* nor for any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.]

CHAPTER IV.

OF EXTENSIONS OF THE ORIGINAL CHURCH ESTABLISHMENT—AND HEREIN OF CHAPELS—OF NEW CHURCHES AND CHAPELS—AND NEW ECCLESIASTICAL DISTRICTS AND PARISHES.

THE constitution of the Church of England, in what regards its regular and proper establishment of prelates, ministers, churches and endowments, as above explained, is, for the most part, as antient as the common law itself. But since the original foundations of that establishment were laid, and particularly in our own times, various alterations have been introduced, tending greatly to improve and enlarge the venerable edifice—and we shall endeavour to give some account of these in the course of the following chapter.

The spiritual ministrations of the Church are mainly intrusted, (as may be inferred from the preceding statements) to the parochial clergy—in other words, the rectors, vicars, and perpetual curates of the different parishes of which the realm is composed, with the temporary curates whom they may think fit to employ for their assistance. Each parish contains a church, with a permanent incumbent of one of the three descriptions above enumerated,—the parochial division of the kingdom being indeed itself referential to the establishment of churches therein; every place in which a church has happened to be erected and endowed, having received from remote times the denomination of a parish (a).

(a) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*" (Jeffrey's case, 5 Rep. 67 a.) As to the formation of parishes and parish churches, vide sup. vol. I. p. 116; Hallam, Mid. Ages, vol. ii. p. 205, 7th edit.

These parishes when first founded were presumably, in general, of a size and population proportioned to the establishment of the single church and minister thus respectively provided for them; and the number of them has, from a very early period, been such as to comprehend almost the entire realm—there being comparatively but very few and scanty portions of territory which have remained extra-parochial.

To the uniformity of this system the only exception was, that in certain parishes *chapels* were founded, in which divine service, and (in some instances), the rights of sacrament and sepulture, might be lawfully celebrated, in the same manner as in the parochial churches themselves. These chapels were of various descriptions. Some were *private*, being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities—while others were *public*, and designed for the benefit of particular districts lying within the parochial ambit (*b*). These last were, in general, founded at some period later than the church itself; and were designed for the accommodation of such of the parishioners as in course of time had begun to fix their residence at a distance from its site; and chapels so circumstanced were described as *chapels of ease*, because built in aid of the original church (*c*). But there were others which seem to have been coeval with, and independent of, the church; and to have been designed for the benefit of some particular districts never included within its pale, though locally embraced by the parochial division (*d*). With respect to the chapels of ease (also called *chapels belonging to the mother church* (*e*)), they were either *parochial*, in which both divine worship and the rites of sacrament and sepulture were performed—or *mere* chapels of ease, and designed for divine worship only.

(*b*) Godolph. Ab. 145; Farnworth *v.* Bishop of Chester, 4 B. & C. 568.

(*c*) Wats. C. L. 645; Farnworth *v.* Bishop of Chester, ubi sup.; Reg. *v.* Foley, 2 C. B. 664.

(*d*) Craven *v.* Sanderson, 7 Ad. & El. 880.

(*e*) Wats. C. L. ubi sup.

But as to chapels of ease of either description, these doctrines equally prevailed and are still law—that of common right the nomination to them is in the incumbent, and cannot be taken from him except by agreement between himself, the patron and the ordinary (*f*); and that their establishment in any parish does not of itself deprive the inhabitants accommodated therein, of the right of resorting to the church; nor, on the other hand, exempt them from liability to its repairs, or any other parochial burthen (*g*).

To the number of chapels thus created in antient times considerable additions were afterwards made in comparatively modern periods—many new chapels of ease (particularly in towns), having latterly been built and endowed, to meet the demands of a population beginning to overflow: and among these may be particularly noticed a species of recent introduction (*h*), called *proprietary chapels*; so called because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise.

But these casual additions to our regular establishment, though numerous, were not found adequate to the growing exigency of the case; and in 1818 the legislature began to apply itself, systematically, to the great object of extending the accommodation afforded by the national Church, so as to make it more commensurate with the wants of the people. In that year, and during the interval which has since elapsed, a variety of statutes have been passed for

(*f*) Farnworth *v.* Bishop of Chester, ubi sup.; and see Dixon *v.* Kershaw, Amb. 528; Duke of Portland *v.* Bingham, 1 Hagg. 168.

(*g*) Ball *v.* Cross, 1 Salk. 165; see Dent *v.* Rob, 1 You. & C. 1. In chapels another distinction exists, with which it did not seem necessary to incumber the text. Some are *free chapels*, so called because not liable to the visitation of the ordinary, as churches and chapels generally are. These free chapels are always of royal foundation, or founded at least by private persons to whom the crown thought fit to grant the privilege. Wats. C. L. 645; 1 Burn, E. L. 298.

(*h*) Moysey *v.* Hilcoat, 2 Hagg. 30.

this purpose, which are known by the denomination of the Church-building Acts.

Under authority of these Acts (*i*) the Crown appointed, for a limited period, a corporate body of commissioners under the title of "Her Majesty's Commissioners for Building New Churches," who were directed to examine into the state of parishes and extra-parochial places in England and Wales, and to ascertain where the accommodation of additional churches and chapels was required, and out of the funds placed at their disposal by parliament to cause such churches and chapels as they thought necessary to be built, or to assist the parishioners, or any persons subscribing for the purpose, with grants or loans of money. By these several acts, also, a great variety of additional powers were granted to the Commissioners, with respect not only to the building, enlargement, purchase or endowment of churches, but to the division of parishes, (so far as ecclesiastical purposes were concerned, and by such consents and such sanction of her majesty in council, as in the acts provided,) into separate parishes or separate ecclesiastical districts—and with respect, also, to many other purposes of the same general character.

As in connection with all these purposes the acts contain a vast number of provisions too numerous and too complex for particular notice in this place, and as their importance is in some measure superseded by the introduction of certain other recent enactments, of which we shall presently speak, we shall content ourselves with stating, that the powers of the Church-building Commissioners, after being long and largely acted upon, have been at length transferred to (*k*), and are now vested in, "The Ecclesiastical

(*i*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 7 Will. 4 & 1 Vict. c. 75; 1 & 2 Vict. c. 106, ss. 25, 80; c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38, s. 19; 6 & 7 Vict. c. 37, s. 24; 7 & 8 Vict. c. 56; 8 & 9 Vict. c. 70; 9 & 10 Vict. cc. 68, 88; 11 & 12 Vict. cc. 37, 71; 14 & 15 Vict. c. 97; 17 & 18 Vict. cc. 14, 32; 18 & 19 Vict. c. 127.

(*k*) By 19 & 20 Vict. c. 55.

Commissioners,"—a corporate body or board, of which we will here proceed to state the origin.

During the course of legislation upon church-building and the division of parishes for ecclesiastical purposes that has been just described, the zeal of the nation was also gradually awakened for the improvement of our ecclesiastical establishment in other particulars—and, in the year 1835, gave birth to a measure of the utmost importance. This was the issuing of certain royal commissions, directed to consider the state of the several dioceses of England and Wales, with reference to the amount of their revenues and the more equal distribution of episcopal duties; and also to consider the state of the cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as might render them most conducive to the efficiency of the established church—and further, to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy in their respective benefices.

The persons appointed under these commissions, having proceeded to the execution of their duties, presented several reports, containing a variety of recommendations for improvement of our ecclesiastical system: and these were followed by an act of parliament, 6 & 7 Will. IV. c. 77, forming certain prelates and laymen of distinction into a body corporate, by the style of "The Ecclesiastical Commissioners for England" (*l*); and empowering them to lay before the sovereign in council such Schemes as might be best adapted to carry the aforesaid recommendations into effect (*m*). And it was enacted, that when any such

(*l*) As regards the Ecclesiastical Commissioners, see also the following statutes, 3 & 4 Vict. c. 113, s. 78; 4 & 5 Vict. c. 39; 6 & 7 Vict. cc. 37, 77; 7 & 8 Vict. c. 94; 13 & 14 Vict. cc. 41, 94; 14 & 15 Vict. c. 104; 16 & 17 Vict. c. 35, s. 50; 19 & 20 Vict. cc. 55, 104; 20 & 21 Vict. c. 74. By 13 & 14 Vict. c. 94, ss. 1, 3, authority was given to appoint another board, viz. that of Church Estate Commissioners, who are to be members of and form a committee of the former board, and to whom all matters relative to the sale, purchase, management, &c., of lands, &c., are to be entrusted.

(*m*) By 13 & 14 Vict. c. 94, s. 26, the Ecclesiastical Commissioners are required to lay an annual report be-

Scheme should be ratified by an order in council, duly registered in the registry of the diocese, and gazetted, it should have the same effect as if it had formed part of that Act.

In pursuance of this provision, the Ecclesiastical Commissioners (who now comprise other persons in addition to the original members, and include all the bishops of England and Wales, and all the chief justices, as well as other persons of distinction,) (*n*) proceeded to prepare many such Schemes as above described; and these, being afterwards embodied in orders in council (*o*), have accordingly acquired the force of parliamentary law. By these Schemes, and by the authority of occasional acts of parliament connected with them, various alterations were made in the arrangement of dioceses, including the erection of the new sees of Ripon and Manchester, and the union of the sees of Gloucester and Bristol; and, in order to augment the income of the smaller bishoprics, contribution was required to be made from time to time from the revenues of the larger, without prejudice however to the rights of existing prelates.

Among the measures of Church reform thus introduced, are those also which are contained in 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39 (*p*). These statutes, which are com-

fore the Secretary of State, to be by him submitted to parliament, of all their proceedings for the current year.

(*n*) 3 & 4 Vict. c. 113, s. 78.

(*o*) These orders in council were up to 24th August, 1838, twenty-three in number. (Rogers's Ecc. L. 368.)

(*p*) These statutes were preceded by some others of the present reign, passed with the same general object of improving the efficiency of the establishment, but with the statement of which it did not seem necessary to crowd the text. These are 1 & 2 Vict. c. 106, (extended by 13 & 14 Vict. c. 98, and 18 & 19 Vict. c. 127,) which we have already had occasion to notice (vide sup. p. 33) in regard to pluralities, but which also provides, under such circumstances as it describes, for the union of several benefices, or the separation of benefices which have been united, the separation of hamlets, &c., from the mother churches, and the annexation of extra-parochial places to contiguous parishes, or their conversion into separate parishes. Also 2 & 3 Vict. c. 30, which, in cases where there is more than

monly called the Cathedral Acts (*q*), among a great variety of other arrangements, provide for the suspension of a large number of canonries, (subject, in certain events, to a power of revival, upon condition of their being newly endowed (*r*):) and for the suppression of all sinecure rectories (*s*), except those in the patronage of private persons (*t*); and of certain deaneries (*u*): and for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and some other dignities and offices, in the Ecclesiastical Commissioners (*v*): and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied, (in general, and under such authority as in the acts provided,) to make additional provision for the cure of souls, in parishes where such assistance shall be most required (*x*).

But provisions of a not less important character and of still more recent date, in reference to the same great object of putting the Church into a state of full efficiency, are to be found in the 6 & 7 Vict. c. 37, and the 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104, for amending and extending the same. The two first of these are usually described as Sir Robert Peel's acts, the last as the Marquis of Blandford's (*y*). The second of them—relating to mat-

one spiritual person having cure of souls in a benefice, provides for an apportionment of the duties. Also 2 & 3 Vict. c. 49, which converts churches and chapels newly endowed, and new parishes, in certain cases, into perpetual curacies.

(*q*) See also 6 & 7 Vict. c. 77, an Act passed to regulate the "Cathedral Churches of Wales."

(*r*) 3 & 4 Vict. c. 113, s. 20.

(*s*) Ibid. ss. 48, 54; 4 & 5 Vict. c. 39, s. 17; et vide sup. p. 25.

(*t*) As to these, also, provision is made for suppressing them, with the concurrence of the patrons. (3 & 4 Vict. c. 113, s. 48.)

(*u*) 3 & 4 Vict. c. 113, ss. 21, 51; 4 & 5 Vict. c. 39, s. 6.

(*v*) 3 & 4 Vict. c. 113, ss. 49, 51; 4 & 5 Vict. c. 39, ss. 6, 7.

(*x*) 3 & 4 Vict. c. 113, s. 67. See Report of Royal Commissioners to inquire into the state and condition of the Cathedrals and Collegiate Churches of England and Wales. This Report was published September, 1854.

(*y*) These statutes may be cited respectively as the "New Parishes Act, 1843, 1844, or 1856," as the case may require. 19 & 20 Vict. c. 104, s. 35.)

ters of detail only—it will be sufficient to have thus mentioned. But of the first and the last, as full an account must be given as is consistent with our limits.

The 6 & 7 Vict. c. 37 (z), after reciting that "it is expedient to make better provision for the spiritual cure of populous parishes, and to render the estates and revenues vested in the Ecclesiastical Commissioners for England, and the funds at the disposal of the governors of Queen Anne's bounty, applicable immediately to such purpose," enables the former to borrow from the latter the capital sum of 600,000*l.* three per cent. reduced bank annuities: which capital may be afterwards increased by similar loans, if required. And all monies accruing to the said Commissioners, by reason of the suspension of canonries under the Cathedral Acts of 3 & 4 Vict. and 4 & 5 Vict. above referred to, together with all the lands and hereditaments thereby vested in them, are charged by way of security for the repayment of such loans (*a*). The statute in question then proceeds farther to recite, that there are divers parishes, chapelries, and districts of great extent, and containing a large population, wherein the provision for worship and pastoral superintendence is insufficient; and enacts, that if at any time it shall be made to appear to the Ecclesiastical Commissioners, that it would promote the interest of religion that any part of such parishes, chapelries, or districts, or any extra-parochial places, should be constituted a separate district for ecclesiastical purposes, (the same not containing any consecrated church or chapel in use for divine worship,) it shall be lawful by the authority in the Acts provided, (that is to say, a Scheme prepared by the Ecclesiastical Commissioners, and an order issued by her majesty in council ratifying such Scheme,) and with consent of the bishop of the diocese under this hand and seal, to set out

(z) The 6 & 7 Vict. c. 37, extends to England and Wales, the Isle of Man, Guernsey, Jersey, Alderney, Sark, and the Scilly Islands. (Sect 26.)

(a) 6 & 7 Vict. c. 37, s. 4.

such district accordingly by metes and bounds, and to fix and declare its name (*b*). The Scheme, however, is to be first laid before the incumbent and patron, so as to give them an opportunity of making such remarks or objections as may occur (*c*).

Upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (*d*): and the right of nomination of such minister may be granted and assigned to any ecclesiastical corporation, or any of the universities of Cambridge, Oxford, or Durham, or any of their colleges, or to any private person, or their nominees,—upon condition of their contributing to the permanent endowment of such minister, or towards providing a church or chapel for the district, in such proportion and manner as shall be approved by the like authority (*e*); but, until the patronage shall be so granted, the right of nomination shall belong to her majesty and the bishop of the diocese alternately (*f*). The funds placed in the hands of the Ecclesiastical Commissioners, are also to be made available for the purpose of endowing or augmenting the income of the ministers of the new districts to such an amount, and in such proportion and manner, as the Commissioners may in their Scheme (ratified by her majesty in council) recommend (*g*).

At any time after the constitution of such district, and while it is still unprovided with a church, the bishop is also empowered to license any building within the same, for performance of divine service (*h*); and may, either after such building is procured or before, license the minister to perform any pastoral duties (with the exception only of burials and marriages) in such district; and the minister so licensed shall be considered as having, to that extent, the cure of souls within the district, and that independently of

(*b*) 6 & 7 Vict. c. 37, s. 9.
(*c*) Ibid.
(*d*) Ibid.
(*e*) Sect. 26.
(*f*) Sect. 21. Et vide 7 & 8 Vict. c. 94, s. 1.
(*g*) 6 & 7 Vict. c. 37, s. 19.
(*h*) Sect. 13.

the incumbent of the parish church (*i*): and he shall be a body corporate, with perpetual succession, by the style of the *minister* of such district. But after a church or chapel shall have been built or purchased for the district, approved by the Commissioners, by an instrument under their common seal, and duly consecrated,—the district shall (immediately upon such consecration), become a new *parish* for ecclesiastical purposes; and shall be known by the name of the new parish of ——, instead of the district of ——; and it shall become lawful to solemnize marriages, baptisms, churchings, and burials therein (*k*); and the minister, having been first duly licensed by the bishop to such new parish, shall thereupon *ipso facto* become perpetual curate thereof, and shall be endowed with an income of not less than 150*l.* *per annum* (*l*); and the new parish and church shall be deemed to be a perpetual curacy and a benefice with cure of souls to all intents and purposes; and two fit persons, being members of the Church of England, shall be annually chosen, by the perpetual curate and inhabitants of the new parish, as churchwardens; and be charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*m*).

It is further provided by the same Act, that, until parliament shall otherwise determine, nothing therein contained shall affect any right or liability, ecclesiastical or civil, of any parish, chapelry, or district, except as therein expressly provided (*n*); and, by way of compensation to the incumbents of mother churches, whose fees or emoluments shall have been diminished by the constitution of new districts or parishes,—an annual sum may, by the proper authority, be allowed out of the fund in the hands of the Ecclesiastical Commissioners (*o*).

(*i*) 6 & 7 Vict. c. 37, s. 11.
(*k*) Sect. 15.
(*l*) Sect. 9.
(*m*) Sect. 17.
(*n*) Sect. 18. As to the liability of a district church to be rated parochially, see Mills *v.* Rydon, 10 Exch. 67.
(*o*) 6 & 7 Vict. c. 37, s. 19.

By the 19 & 20 Vict. c. 104 (*p*), it is made lawful to constitute a district under the provisions of 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, notwithstanding that there may be, within the limits of any such district, a consecrated church or chapel (*q*):—an important extension, it will be observed, of their provisions in regard to this subject, which allow the constitution of no district in which a consecrated church or chapel is already contained (*r*). The Ecclesiastical Commissioners are also empowered, on the constitution of any new district, to specify some existing or intended church within it, as the parish church thereof: and immediately on the ratification of their Scheme, by order in council, the district is to become a new parish accordingly; and the church so specified, the church thereof; and the incumbent of such church liable to the performance of all pastoral duties within the limits of the new parish (*s*). And it shall be lawful for the Commissioners to recommend the constitution of such district, without providing in the Scheme for the same the permanent endowment required by the Act of 6 & 7 Vict. c. 37,—if it shall appear to them, and it shall be declared in their Scheme, that there is reason to expect from other sources an adequate maintenance for the incumbent (*t*).

This Act contains also a variety of provisions extending the provisions of 6 & 7 Vict. c. 37, as to the assignment of the right of patronage, in return for endowment (*u*); but of a character too copious and complicated for detail in this place (*x*). It contains also, (besides others which for the same reason it will be necessary to pass over,) a provision (by way of addition to powers of the same general descrip-

(*p*) The 19 & 20 Vict. c. 104, extends to England and Wales, the Isle of Man, Guernsey, Jersey, Alderney, Sark, and the Scilly Islands (sect. 34).

(*q*) 19 & 20 Vict. c. 104, s. 1.

(*r*) Vide sup. p. 117.

(*s*) 19 & 20 Vict. c. 104, s. 2.

(*t*) Sect. 3. The commissioners may, with consent of the bishop, order that pew rents may be taken in any church to which a district may be assigned, if other sources fail, but not otherwise. (Sect. 6.)

(*u*) Vide sup. p. 118.

(*x*) 19 & 20 Vict. c. 104, ss. 16, 24.

tion which the Commissioners possess by derivation from the Church-building Commissioners as already noticed (*y*),) that the Commissioners may, by the authority of her majesty in council ratifying their Schemes for the purpose, and subject to such consents as in the Act specified, divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes whatsoever, making regulation at the same time relative to the duties and character of the incumbents of the respective divisions; and to the performance of the offices and services in the respective churches, and the fees to be taken for the same respectively; and relative to any other matter or thing which may be necessary or expedient by reason or in consequence of such change (*z*). Such a division, however, is in no case to take effect until the next avoidance of the church of the parish so divided, unless with the consent in writing of the actual incumbent thereof (*a*).

(*y*) Vide sup. p. 113.

(*z*) 19 & 20 Vict. c. 104, s. 25.

(*a*) Ibid.

PART III.

OF THE SOCIAL ECONOMY OF THE REALM.

IN our examination of Public rights, we have now taken a distributive view of those which concern the relation between persons in authority, and persons subject to authority; and have thus been led to treat successively of the *Civil Government* and of the *Church*. But there are many other institutions which belong, equally with these, to the division of public rights,—as relating immediately to the community at large, or to large classes of it, and not merely to the individual; and which yet, as having no connection with the subject of government, whether civil or ecclesiastical, have hitherto found no proper place in our disquisitions. In conformity with the division laid down at the outset of the Book (*a*), these may be designated without impropriety, it is conceived, (though perhaps without sufficient authority,) as the laws of *Social Economy*;—and the following Part will be devoted to the examination of them under their principal heads.

(*a*) Vide sup. vol. II. p. 324.

CHAPTER I.

OF THE LAWS RELATING TO CORPORATIONS (*a*).

THE principal of those social institutions, called bodies corporate (*corpora corporata*) or corporations, has already been in some measure explained; and we have seen that they are artificial persons endowed with the legal capacity of perpetual succession (*b*).

Of these [there is a great variety, subsisting for the advancement of religion, of learning, or of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations let us consider the case of a college in any of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assem-

(*a*) In law treatises, the treatment of corporations at an earlier stage, may in one point of view appear preferable; there being branches of the law which cannot be discussed without supposing an acquaintance, to a certain extent, with the law of corporations. Blackstone has accordingly inserted them in his first volume, prior to any consideration of the laws of property; a position, it is conceived, which is liable to much objection. But the arrangement adopted for the present work, necessarily assigns the subject to the place it occupies in the text;—these institutions being incident to the division of public rights, but having no immediate connection with church or state. And no inconvenience appears likely to attend our method in this respect, as the nature of corporations has already been explained in anticipation, so far as appeared necessary for the information of the student at the time. Vide sup. vol. I. pp. 356, 454, 471.

(*b*) Vide sup. vol. I. p. 356.

[bly, the individuals which compose it might indeed pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame nor receive any laws or rules of their conduct—none, at least, which would have any binding force, for want of a coercive power to create a sufficient legal obligation. Neither could they be capable of retaining any privileges or immunities: for if such privileges be attacked, which of all this unconnected assembly has the right or ability to defend them? And when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves?

So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other as often as the hands are changed.

But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, (which are a sort of municipal laws of this little republic;) or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws.] Again, [the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successors. For all the individual members that have existed from the foundation to the present time, or that shall ever after exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were in-

[troduced, as Plutarch says, by Numa; who, finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law (*c*), in which they were called *universitates*, as forming one whole out of many individuals: or *collegia*, from being gathered together. They were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation,—particularly with regard to sole corporations, consisting of one person only,—of which the Roman lawyers had no notion; their maxim being that *tres faciunt collegium* (*d*): though they held, that if a corporation originally consisting of three persons be reduced to one, *si universitas ad unum redit*, it may still subsist as a corporation, *et stet nomen universitatis* (*e*).]

Before we proceed to say more of corporations, it will be expedient to take a view of the several sorts of them; but here we must premise the general remark that we have no intention for the present to take any notice of those kinds which may be created (as will appear hereafter) under modern statutes, with new and peculiar incidents by way of innovation upon the principles of the common law: but mean to confine ourselves, in the first instance, to corporations that are governed by those principles,—or, in other words, to corporations ordinarily and properly so called.

[The first division of corporations is into *aggregate* and *sole*. Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members so as to continue for ever—of which kind are the mayor and commonalty of a city, the head and

(*c*) Ff. l. 3, t. 4, per tot.

(*d*) Ff. 50, 16, 8, 9.

(*e*) Ff. 3, 4, 7.

[fellows of a college, the dean and chapter of a cathedral church. Corporations *sole* consist of one person only and his successors, in some particular station; who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation (*f*); so is a bishop; so are some deans distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches the freehold of the church, the church-yard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants, and with intent that the same emolument should ever afterwards continue as a recompence for the same care. But how was this to be effected? the freehold was vested in the parson; and if we suppose it vested in its natural capacity, on his death it might descend to his heirs, and would be liable to his debts and incumbrances; or at least the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent and his predecessor who lived eight centuries ago, are in law one and the same person; and what was given to the one, was given to the other also.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members are entirely spiritual persons,]

(*f*) Co. Litt. 43.

and incorporated as such,—[such as bishops; certain deans; parsons and vicars, which are sole corporations; deans and chapters; and formerly prior and convent, abbot and monks, and the like bodies aggregate. These are erected for the furtherance of religion and perpetuating the rights of the Church.

Lay corporations are of two sorts, *civil* and *eleemosynary.* The *civil* are such as are erected for a variety of temporal purposes. The sovereign, for instance, is made a corporation, to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire. For immediately upon the demise of a sovereign, his heir is, as we have formerly seen (*g*), in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, and the like;] and these are now commonly denominated municipal corporations, of which we shall have occasion to speak more at large before the conclusion of this chapter; [others for the advancement and regulation of manufactures and commerce, as the trading companies of London and other towns (*h*), and others for the better carrying on of divers special purposes,—as the Colleges of Physicians and Surgeons, for the improvement of the medical science—[the Royal Society, for the advancement of natural knowledge,—and the Society of Antiquaries, for promoting the study of antiquities. And among these the general corporate bodies of Cambridge and Oxford must be ranked (*i*); for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy; neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and profes-

(*g*) Vide sup. vol. II. p. 468.

(*h*) See 7 Geo. 3, c. 48, regulating in some respects the proceedings of trading companies with joint stocks.

(*i*) Rex *v.* Cambridge Vice-Chancellor, 3 Burr. 1656. With respect to the government, &c. of these universities, see 19 & 20 Vict. c. 88, and cap. xvii. (as to Cambridge); 17 & 18 Vict. c. 81; 18 & 19 Vict. c. 36; 19 & 20 Vict. cc. 31, 95; 20 & 21 Vict. c. 25 (as to Oxford).

[sors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty.

The *eleemosynary* sort are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick and impotent, and all colleges both in our universities and out of them (*k*); which colleges are founded for two purposes: 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations,] though in some things (*l*) partaking of the nature of ecclesiastical bodies, [are strictly speaking lay and not ecclesiastical, even though composed of ecclesiastical persons (*m*).] And accordingly they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitations of the ordinary or diocesan in their spiritual characters (*n*).

[Having thus marshalled the several species of corporations, let us next proceed to consider—I. How corporations in general may be created. II. What are their powers, capacities and incapacities. III. How corporations are visited. And IV. How they may be dissolved.

I. Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* (*o*). It does not appear that the prince's consent was necessary to be actually given to the foundation of them, but merely that the original founders of these voluntary societies, for they were

(*k*) Such as at Eton, Winchester, Manchester, &c.

(*l*) 1 Bl. Com. 470.

(*m*) Philips *v.* Bury, 1 Ld. Raym. 6.

(*n*) Christian's Blackstone, vol. i. p. 472 (note).

(*o*) Ff. 47, 22, 1.

[little more than such, should not establish any meetings in opposition to the laws of the state.

But with us in England, the sovereign's consent is absolutely necessary to the erection of any corporation—either impliedly or expressly given.

The crown's *implied* consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence.] Of this sort are [the sovereign himself, all bishops, parsons, vicars, and some others (*p*): who by common law have been held, (as far as our books can show us,) to have been corporations *virtute officii:* and this incorporation is so inseparably annexed to their offices that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time. Another method of implication, whereby the crown's consent is presumed, is as to all corporations by *prescription*, such as the city of London and many others (*q*), which have existed as corporations, time whereof the memory of man runneth not to the contrary (*r*); and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity, the law presumes there once was one; and that, by the variety of accidents which a length of time may produce, the charter was lost or destroyed.

The methods by which the crown's consent is *expressly* given, are either by act of parliament or charter. By act of parliament, (of which the royal assent is an indispensable ingredient,) corporations may undoubtedly be created (*s*);]

(*p*) Blackstone enumerates *church-wardens* also. But these are only a *quasi* corporation. See Smith *v.* Adkins, 8 Mee. & W. 362.

(*q*) 2 Inst. 330.

(*r*) Vide sup. vol. I. p. 46.

(*s*) We may remark here, that in acts of parliament for creating or regulating corporations, (which are in fact of continual occurrence,) it has latterly been usual, when certain objects of an ordinary kind are in view, to introduce an adoption, in general terms, of certain *other* acts, consolidating the provisions usually made by parliament in reference to such objects. These consolidating acts are chiefly—The Companies

[as well as by royal charter: but it is observable that the authority of parliament, as regards their creation, has been frequently exercised only in aid or corroboration of the royal prerogative; as when the charter of the College of Physicians, (of the tenth year of Henry the eighth (*t*),) was afterwards confirmed by the statute 14 & 15 Hen. VIII. c. 5; or when the crown was permitted by statute 5 & 6 W. & M. c. 20, to erect the corporation of the Bank of England with certain powers; or when by the more recent statute of 5 & 6 Will. IV. c. 76, it was enacted, that, upon petition of the inhabitant householders of any borough in England or Wales, the king might, by his charter, incorporate such borough according to the provisions of that act (*u*).

The creation by the crown of a body corporate [may be performed by the words, *creamus, erigimus, fundamus, incorporamus*, or the like. Nay, it is held that if the crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*v*), this is also sufficient to incorporate and establish them for ever (*x*).

The crown, (it is said,) may grant to a subject the power of erecting corporations (*y*), though the contrary was formerly held (*z*); that is, it may permit the subject to name

Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). An instance of the manner in which the adoption is introduced, occurs in the 151st section of the recent act of 18 & 19 Vict. c. 120, called "The Metropolis Local Management Act."

(*t*) 8 Rep. 114.

(*u*) Vide Rutter *v.* Chapman, 8 Mee. & W. 1.

(*v*) *Gild* signified among the Saxons a fraternity, and was derived from the verb ʒilban, to pay, because every man paid his share towards the expenses of the community. Such of these gilds as were commercial, gradually took the shape of our present municipal corporations, whose place of meeting, it may be observed, is still called the *Guild-hall*. Some curious information as to the Anglo-Saxon gilds or clubs will be found in Turner's Hist. Ang. Sax. vol. iii. p. 98, 6th ed.; where mention is made, among other instances, of a gild of the clergy at Canterbury, and a gild of thegns at Cambridge.

(*x*) 10 Rep. 30; 1 Roll. Ab. 513.

(*y*) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76.

(*z*) Year Book, 2 Hen. 7, 13; et vide per Lord Kenyon, R. *v.* Coopers' Company, 7 T. R. 548.

[the persons and powers of the corporation at his pleasure; but it is really the sovereign that erects, and the subject is but the instrument: for, though none but the crown can make a corporation, yet *qui facit per alium, facit per se.* In this manner the Chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it in the erection of several matriculated companies of tradesmen subservient to the students.]

When a corporation is erected, a name is always given to it (*a*), or, supposing none to be actually given, will attach to it by implication; [and by that name alone it must sue and be sued, and do all legal acts; though a very minute variation therein is not material;] and the name is capable of being changed (by competent authority (*b*),) without affecting the identity or capacity of the corporation in other respects (*c*). But some name [is the very being of its constitution; and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions (*d*). The name of incorporation, says Sir E. Coke, is as a proper name or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a god-father; and by that same name the king baptizes the incorporation (*e*).

II. After a corporation is so formed and named, it acquires many powers, rights, capacities and incapacities; which we are next to consider.]

Among them are some which attach both to corporations sole and aggregate, viz. 1. They may purchase lands and hold to them and their successors (*f*), as natural persons may, to hold to them and their heirs (*g*); though their

(*a*) Blackstone says a name *must* be given (1 Bl. Com. 475); but it appears by 1 Salk. 191, that a name of incorporation may be *implied.*

(*b*) See Queen v. Registrar of Joint-Stock Companies, 10 Q.B. 839.

(*c*) 4 Rep. 87.

(*d*) Gilb. Hist. C. P. 182.

(*e*) 10 Rep. 28.

(*f*) As to title by succession, see 2 Bl. Com. 430.

(*g*) 10 Rep. 30.

power of holding lands is subject to the provisions of the statutes of mortmain, of which we have spoken in a former place (*h*). 2. Aggregate corporations, when of the eleemosynary, or ecclesiastical, or municipal kind,—and corporations sole,—are, in general, subject to certain restrictions with regard to the alienation of their lands, a point to which we have also had occasion elsewhere to refer (*i*). But the other incidents of which we speak belong, in general, to corporations aggregate only: viz. 3. [They may sue or be sued, implead, or be impleaded, grant or receive,] and do all other acts, [by the corporate name,] as natural persons may by their individual names. 4. And, as a corollary from this, they are amenable to such judgments as shall be given against them in any suit, in respect of the corporate property only; and not so as to fix any liability on the members or corporators personally or individually (*k*). 5. Their acts are to be under their common seal; [for a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse. It therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*l*).] There are some personal acts however as to which convenience has introduced an exception to this rule. Thus a corporation may (through its head) give

(*h*) Vide sup. p. 95; et sup. vol. I. p. 454.

(*i*) Vide sup. vol. I. p. 471. Et sup. p. 95, &c.

(*k*) The maxim of the civil law is the same: "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*"—Ff. 3, 4, 7.

(*l*) Dav. 44, 48. See the following cases as to the necessity (in general) that the acts of a corporation should be under seal: Governor and Company of Copper Mines *v.* Fox and others, 16 Q. B. 229; Coit *v.* Ambergate, &c., Railway Company, 17 Q. B. 127; Diggle *v.* London and Blackwall Railway Company, 5 Exch. 442; Smart *v.* Guardians of the West Ham Union, 10 Exch. 867; Smith *v.* Hull Glass Company, 8 C. B. 668. As to ecclesiastical corporations, vide 5 & 6 Vict. c. 108, s. 27.

command to a bailiff to make a distress, and this needs not to be authenticated under the common seal (*m*). 6. They may [make bye-laws or private statutes for the better government of the corporation; which are binding on themselves, unless contrary to the laws of the land (*n*),] or contrary to or inconsistent with their charter (*o*), or manifestly unreasonable (*p*). [For as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic. And this right of making bye-laws, for their own government, not contrary to the law of the land, was allowed by the law of the Twelve Tables at Rome.] And in our law it is held to be a right so much of course, as regards every corporation, that if the charter by which certain persons are incorporated give to a select body, out of their whole number, a power to make bye-laws as to certain specified matters, the body at large is nevertheless at liberty to make them with regard to all matters not specified (*q*). Every corporation, too, has a right, as of course, to alter or repeal the bye-laws which itself has made (*r*). 7. It is subject to certain disabilities, which may compendiously be stated as follows. A corporation [must always appear by attorney, for it cannot appear in person, being, as Sir E. Coke says invisible, and existing only in intendment and consideration of law.] It cannot be executor or administrator, [nor perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be

(*m*) Lutw. 1497; 1 Salk. 191.

(*n*) As where a bye-law is made limiting the number of apprentices which each member shall take. (R. *v.* Coopers' Company, 7 T. R. 543.) No trading company can make laws which may affect the royal prerogative, or the common profit of the people, under penalty of 40*l.*, unless approved by the chancellor, treasurer, and chief justices or judges in their circuits; and, even if approved, still, if contrary to law, they are void. (19 Hen. 7, c. 7; 11 Rep. 54.)

(*o*) See Rex *v.* Cutbush, 4 Burr. 2204; Hoblyn *v.* Rose, in error, 2 Bro. P. C. 329; R. *v.* Cambridge, 2 Selw. N. P. 1144.

(*p*) See Piper *v.* Chappell, 14 Mee. & W. 624; Queen (The) *v.* Powell, 3 Ell. & Bl. 377.

(*q*) R. *v.* Westwood, 7 Bing. 1; S. C. 4 B. & Cress. 781; 4 Bligh, N. S. 213.

(*r*) R. *v.* Ashwell, 12 East, 22.

[seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution (s).] And in general it can be guilty of no crime in its corporate capacity (t). Yet it is liable, in certain cases, to an indictment,—as where it allows a bridge, the repair of which belongs to it by law, to fall into decay. And it is capable of suing or being sued for breach of contract, and for many other kinds of civil injury. But a corporation cannot be excommunicated;] for it has no soul, as is gravely observed by Sir E. Coke (u): neither is it liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ* (v).] Moreover, [aggregate corporations that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head (x). But there may be a corporation aggregate constituted without a head: as the collegiate church of Southwell in Nottinghamshire (y), which consists only of canons (z); and the governors of the Charter-house, London; who have no president or superior, but are all of equal authority. 8. Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole (a). By the civil law, the major part must have consisted of two-thirds of the whole; else no act could be performed (b): which perhaps may be one reason why they required three at least to make a corporation. But with us *any* majority is sufficient to determine the act of the whole body. And whereas, notwith-

(s) Bro. Abr. tit. Feoffment al Uses, 40; Bac. on Uses, 347.

(t) 1 Bl. Com. 476. See The Queen v. Pocock, 17 Q. B. 34; Stevens v. Midland Railway Company, 10 Exch. 352.

(u) 10 Rep. 32.

(v) 1 Bl. Com. 477.

(x) Co. Litt. 263, 264.

(y) See as to suspension of canonries or prebends at Southwell, 3 & 4 Vict. c. 113, ss. 18, 36, 41; 4 & 5 Vict. c. 39, s. 12.

(z) Blackstone says *prebendaries*, but by 3 & 4 Vict. c. 113, s. 1, *canons* is now the proper appellation.

(a) Bro. Abr. Corporation, 31, 34. As to the consent of the majority present being sufficient, Cotton v. Davies, 1 Str. 53; Oldknow v. Wainwright, 2 Burr. 1017.

(b) Ff. 3, 4, 3.

[standing the law stood thus, some founders of corporations had made statutes in derogation of the common law,—making, very frequently, the unanimous assent of the society to be necessary to any corporate act, (which King Henry the eighth found to be a great obstruction to his favourite scheme of obtaining a surrender of the lands of ecclesiastical corporations),—it was therefore enacted by stat. 33 Hen. VIII. c. 27, "that all private statutes shall "be utterly void, whereby any grant or election made by "the head, with the concurrence of the major part of the "body, is liable to be obstructed by any one or more being "the minority;" but this statute extends not to any negative or necessary voice given, by the founder, to the head of any such society (c).] 9. It is also incident to corporations aggregate to have the power of electing their own members and officers; and thus perpetuating their own succession. When this power is not specially assigned, by the charter which creates a corporation, to a particular portion of the members, it belongs to the major part of the whole members duly assembled for the purpose. It may be delegated, however, by a bye-law, (except in the case of municipal corporations (d),) to a select body of the corporators; who then become the representatives, as regards this matter, of the whole community (e). But though (to prevent confusion) the number of electors may be thus restrained, on the other hand, the number of persons out of whom the election is to be made cannot be diminished by a bye-law (f). 10. It is also incident to a corporation aggregate, that they [may take goods and chattels for the benefit of themselves and their successors,] as natural persons may for themselves,

(c) It has been remarked by Mr. Justice Coleridge, in his edition of Blackstone, that "every case in "which the doubt has been, whether "the statutes, in fact, give a negative "or necessary voice to the head or "any other member of the corpo-"ration, confirms by implication "Blackstone's position, the accu-"racy of which has been questioned. "For no such doubt could have "arisen if the statute of Hen. 8 had "taken away such negative in *all* "instances."—Bl. Com. by Coleridge, vol. i. p. 479.

(d) As to these, vide post, p. 148.

(e) Rex v. Spencer, 3 Burr. 1827.

(f) Ibid. 1833.

their executors and administrators; [but a sole corporation cannot] take goods in his corporate capacity (*g*), because [such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid (*h*).] With regard to sole corporations, however, [a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of a hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the Reformation, who represented the whole convent; or the dean of some antient cathedral, who stands in the place of, and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative (*i*). Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*j*).]

All these capacities and incapacities belong as of course to all bodies corporate; and result from the very act of incorporation, without any express mention being made of them in the charter. But they do not attach to any bodies of persons unincorporated; however connected they may be in point of social position, or however united by

(*g*) Co. Litt. 46.

(*h*) Another reason is elsewhere stated by Blackstone (vol. ii. p. 431), viz. that if such chattel interest were allowed to descend to a *successor*, the property itself would be in *abeyance*, from the death of the owner till a successor be appointed; which is contrary to the nature of a chattel interest.

(*i*) Dyer, 48; Byrd *v.* Wilford, Cro. Eliz. 464.

(*j*) 2 Bl. Com. 431, cites Co. Litt. 46.

express compact. Thus the inhabitants of a particular parish are not capable, without being incorporated, of holding lands to them and their successors; though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (*k*). And though a voluntary society of numerous individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society,—yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability: but each member,—even though a holder only of a particular share, and chargeable only to a limited amount according to the articles of agreement,—will be liable nevertheless to be sued in his individual capacity, by all strangers having demands upon the society at large, in the same manner as if he were a member of an ordinary partnership, to the full amount of those demands (*l*); though, on the other hand, he is entitled, in general, as in the case of an ordinary partnership, to have all the other members joined with him as defendants (*m*). Indeed, it has been held that for such a society, or for any persons, to assume

(*k*) Ashby *v.* White, Lord Raym. 951; S. C. 3 Salk. 18; 12 Rep. 121. It is to be observed, however, that there is much property in lands and houses throughout the kingdom which is said popularly *to belong to the parish*. Such property has generally been given or devised to charitable purposes connected with the poor of that parish; but the instrument of gift or will is often lost, and the trustees not known. In some instances too it happens that the property is given or devised not to any individual trustees, but to the overseers, &c. in trust, though these officers are not competent in law to hold to them and their successors. (See 9th Poor Law Rep. p. 29.) To meet such inconveniences there exist some legislative provisions. See 59 Geo. 3, c. 12, ss. 12, 17, 25; 5 & 6 Will. 4, c. 69, s. 5; 5 & 6 Vict. c. 18.

(*l*) To establish such a liability, however, it must appear that the demand is one for which the society at large is properly answerable; which must depend on its constitution and the course of dealing out of which the demand arises. (See Attwood *v.* Small, 7 B. & C. 390; Bramah *v.* Roberts, 3 Bing. N. C. 963; Flemyng *v.* Hector, 2 Mee. & W. 179; Todd *v.* Emly, 7 Mee. & W. 427; 8 Mee. & W. 505; et sup. vol. II. p. 98.)

(*m*) An exception to this has been recently introduced in the case where more than twenty persons carry on in partnership a business having gain for its object; vide post, p. 141.

to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter,—is an invasion of the royal prerogative, and in the nature of a criminal offence at the common law (*n*).

It is obvious that some of the capacities or privileges above pointed out as belonging to corporations, (particularly that of the members being exempt from personal and individual liability,) operate strongly to the advantage of persons associated in great numbers for common objects, and more especially for objects of a commercial kind. Yet, as the law stood until a recent period, the only method by which these privileges or any of them could be obtained by any association of persons, (if that of special parliamentary enactment, by way of exception from the general rule, be put out of question,) was that of procuring itself to be formed into a corporation; and this could be done (as we have seen) only by act of parliament or royal charter; while on the other hand, when such incorporation was once obtained, these privileges all attached, as of course, and without any exception or restriction, to these persons and their successors for ever. This state of things gave rise, as the spirit of commercial enterprise advanced, to great dissatisfaction among large classes of the community; there being many cases in which the solicitation of associated persons to be formed into a body corporate, with all its attendant privileges, was found to be ineffectual, owing to the caution exercised both by parliament and the advisers of the crown, in reference to this subject;—a caution suggested by the fact, which experience had so fully established, that the enterprises of such

(*n*) Duvergier *v.* Fellowes, 5 Bing. 248; S. C. in error, 10 B. & C. 826. By the statute 6 Geo. 1, c. 18 (commonly called the Bubble Act), enacted, says Blackstone, "in the year "after the infamous South Sea pro- "ject had beggared half the nation," it was made highly penal for subscribers to public undertakings to "presume to act as if they were cor- "porate bodies," by making their shares in stock transferable, &c. But this act was repealed by 6 Geo. 4, c. 91, which at the same time remitted such companies to the general prohibition of the common law. See Duvergier *v.* Fellowes above cited, Garrard *v.* Hardey, 5 Man. & Gr. 471; and Harrison *v.* Heathorn, 6 Man. & G. 140.

associations are often of rash or fraudulent conception, and of ruinous consequence to those who are tempted to become subscribers (*o*). The desire, however, to obviate this dissatisfaction, as far as consistent with the welfare of the public at large, at length induced the legislature to make the experiment of authorizing the crown to grant charters of *qualified* incorporation (as it may be termed), that is, charters creative of bodies corporate to which some only of these privileges should attach, or to which they should attach in a partial or modified sense, or which should be for a limited period only, or subject in some other respect to restrictive regulation. Accordingly by statute 7 Will. IV. & 1 Vict. c. 73, after a recital, that "divers associations are "and may be formed for trading or other purposes, some "of which associations it would be inexpedient to incor-"porate by royal charters, though it would be expedient "to confer upon them some of the privileges of and in-"cident to corporations created by royal charters, and also "to invest such associations, or some of them, with certain "other powers and privileges," her Majesty is empowered by letters-patent to grant to any company or body of persons associated for any trading or other purposes whatever, and to the heirs, executors, administrators and assigns of any such persons, although not incorporated by such letters-patent, any privilege or privileges which, according to the common law, it would be competent to the crown to grant to any such company, by charter of incorporation. And the letters-patent may contain provisions declaring the members individually liable in their persons and property to such extent only as shall be limited by such letters-patent. And as regards charters of incorporation, this act also provides that her Majesty may limit the duration of them for a term of years, or any other period whatsoever; and may also make the corporation

(*o*) By a very recent Act, directors, members or public officers of a public company are made guilty in certain specified cases of fraud, of a misdemeanor, and may be sentenced to penal servitude. See 20 & 21 Vict. c. 54.

thereby formed, subject to all the provisions in the act contained as to unincorporated companies.

In the same spirit, but with still wider departure from the principle of the common law, have been since passed the acts with respect to *Joint-Stock Companies;* a term of modern invention, and which has served to express all voluntary associations or partnerships, the shares in which are freely transferable by the holder thereof without the consent of the body at large. These acts pursue, like that of 7 Will. IV. & 1 Vict. c. 73, the plan of qualified incorporation; but add to it the large and very important concession of allowing it to take place at the mere pleasure of parties, and without the co-operation either of parliament or the crown. Of these acts it will be necessary to notice the two last only; their predecessors having been all (subject to some partial exception) repealed (*o*). By these two, viz., the 19 & 20 Vict. c. 47, called "The Joint Stock Companies Act, 1856," and the 20 & 21 Vict. c. 14, called "The Joint Stock Companies Act, 1857," (from the operation of which, however, it must be observed that insurance companies are specially excepted (*p*),) it is provided, that any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the act relative to *registra-*

(*o*) These are the 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies," 10 & 11 Vict. c. 78, intituled "An Act to amend an Act for the Registration, Incorporation and Regulation of Joint Stock Companies," and 18 & 19 Vict. c. 133, called "The Limited Liability Act, 1855." By sect. 23 of the Joint Stock Companies Act, 1857, these are "unrepealed as to any company completely registered, which has not obtained registration under 'The Joint Stock Companies Act, 1856,' until such company obtain registration under the two acts last mentioned; but from that time shall be repealed as to such company."

(*p*) 19 & 20 Vict. c. 47, s. 2. As to *Insurance* companies (existing or future), they remain subject to the provisions of 7 & 8 Vict. c. 110, and any act amending the same. See 20 & 21 Vict. c. 80. By the same section of 19 & 20 Vict. c. 47, *banking* companies were also excepted; but the present state of the law as to these will be found post, chap. XIV.

tion, form themselves into an incorporated company *with*, or *without*, limited liability (q); and that for this purpose the memorandum of association shall, with the articles of association (if any), be delivered to an officer called the Registrar of Joint-Stock Companies, who shall register the same, and that thereupon the Registrar shall certify that the company is incorporated, and in the case of a "limited" company that the company is "limited;" and thereupon the subscribers, together with such other persons as may from time to time become shareholders, shall be a body corporate, by the name prescribed in the memorandum of association, with such power to hold lands as in the act provided (r). But, on the other hand, the act establishes an individual liability in the case of each shareholder for the debts of the company, and establishes it to the amount, if the company be "limited," of what may remain due on the shares held by him,—or, if "unlimited," to an amount sufficient to pay the debts of the company, with all costs and expenses. This liability, also, is to continue in the case of a "limited" company for one year after his shares shall have been transferred,—and in the case of an "unlimited" one, for three years; but, on the other hand, the shareholder is, in the latter case, protected from liability with respect to any debts contracted after the transfer; but in the former, has no such protection. And there is besides a provision that if more than twenty persons shall carry on in partnership any trade or business having the procurement of *gain* to the partnership for its object, such persons shall,—*unless* registered as a company under the Joint-Stock Companies Act, 1856, or constituted a company by some act of parliament or royal charter, or engaged in working mines within, and subject to the jurisdiction of, the Stannaries,—be severally liable for the payment of the whole debts of the partnership, and may be sued for the same, without joinder of any of the other members (s). Any creditor, moreover, to whom the company is indebted in

(q) 19 & 20 Vict. c. 47, s. 3.

(r) Ibid. ss. 13, 38.

(s) 20 & 21 Vict. c. 14, s. 3, repealing the 4th section of 19 & 20 Vict. c. 47.

more than 50*l.* may serve a demand upon it under his hand, requiring it to pay the sum so due, and if he obtain no satisfaction within three weeks, he may take proceedings to have the company *wound up* (*s*); and these proceedings may also be taken by *any* creditor, whatever the amount of his debt, if, in any ordinary action or suit against the company in its corporate character, the execution upon the judgment, decree, or order made in his favour, is returned by the sheriff unsatisfied (*t*). The *winding-up* is to take place upon a petition presented by the creditor to the proper court; which, if the company be "limited," is the court of bankruptcy having jurisdiction in the place where the company's registered office is situate, and, if the company be "unlimited," the High Court of Chancery (*u*). Such court may accordingly make an order for the winding-up: and to assist in that operation may appoint an *official liquidator*, or (where required) more than one such officer; who is to take into his custody all the property, effects and choses in action of the company, and deal with them, by way of sale or otherwise, under the sanction of the court (*v*). And, as soon as may be after this order, the court shall cause the assets of the company to be collected by the official liquidator, and applied in discharge of its liabilities in a due course of administration (*w*); and may also proceed to make *calls* on the several shareholders (*x*) (termed by the Act, when so called upon, *contributories* (*y*)) to the extent of their liability respectively;

(*s*) 19 & 20 Vict. c. 47, s. 68. There are prior acts relative to the *winding-up* of Joint Stock Companies, viz. 7 & 8 Vict. c. 111; 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108; but none of them are to apply to companies registered under the Joint Stock Companies Acts, 1856, 1857. (See 19 & 20 Vict. c. 47, s. 108, and 20 & 21 Vict. c. 49, s. 11.) These prior acts, (to which some existing companies are still subject,) are amended by 20 & 21 Vict. c. 78.

(*t*) Ibid.

(*u*) Sect. 60.

(*v*) Sects. 88—90. In cases within the jurisdiction of the court of bankruptcy, the *official assignee* named by the court shall be the official liquidator (sect. 88); though where the winding-up takes place at the suit of a creditor, the major part in value of the creditors may appoint an official liquidator to act concurrently with the official assignee. (Ibid.) Et vide 20 & 21 Vict. c. 14, s. 15.

(*w*) Sect. 75.

(*x*) Sect. 82.

(*y*) Sect. 65.

and all monies received on account of the sale of the assets of the company, or in respect of the calls made on the contributories, shall be paid (after the necessary deductions for court expenses) into the Bank of England, or some branch thereof, as the court may direct (z), with a view to the ultimate distribution among the creditors. And as soon as the affairs of the company have been completely wound up, the court shall make order for its immediate dissolution (a); upon which it shall be dissolved accordingly. To this general view of the subject of winding-up, however, it must be added, that, whenever a company is unable to pay its debts, a petition for winding-up may be presented by a contributory, as well as by a creditor (b); and that there may also be a *voluntary* winding-up: which takes place when the company itself, at a general meeting, passes a special resolution for the purpose, founded on the votes of three-fourths of the shareholders assembled (c): and that in this latter case, the official liquidator is appointed by the company itself; and may call upon contributories at his own discretion, and exercise all his powers without the intervention of any court (d).

III. Returning from this digression [we proceed next to inquire how corporations may be *visited*. For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise] in them.

[With regard to all ecclesiastical corporations (e), the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the crown, as supreme ordinary, is the visitor of the

(z) 19 & 20 Vict. c. 47, s. 83.

(a) Sect. 93.

(b) Sect. 69. In the court of bankruptcy, if the winding-up take place at the suit of a contributory, the major part in value of the contributories may appoint an official liquidator to act concurrently with the official assignee. Sect. 88; et vide 20 & 21 Vict. c. 14, s. 15.

(c) Sect. 34.

(d) Sect. 104.

(e) Vide sup. p. 126.

archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops: and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations (*f*).]

With respect to lay corporations of the eleemosynary kind (*g*), [the founder, his heirs, or assigns, are the visitors;] for in a lay incorporation the ordinary cannot visit. Yet [if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it;] for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves in such case upon the crown, and is exercised, on behalf of the crown, in the Court of Chancery (*h*).

As to a civil lay incorporation (*i*), it has no visitor, in the sense of the term here intended—but the misbehaviour of all bodies corporate of this class are inquired into and redressed, and their controversies decided, in the Court of Queen's Bench, according to the rules of the common law (*k*). And accordingly in the case of the College of Physicians, though the king by his letters-patent had subjected that body [to the visitation of four very respectable persons,—the Lord Chancellor, the two Chief Justices, and the Chief Baron,—though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for more than a century; yet, in 1753 the authority of this provision coming into dispute on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors;

(*f*) See Re Dean of York, 2 Q. B. 1; The Queen *v.* Dean of Rochester, 17 Q. B. 1.

(*g*) Vide sup. p. 128.

(*h*) R. *v.* Catherine Hall, 4 T. R. 233.

(*i*) Vide sup. p. 127.

(*k*) Per Holt, Philips *v.* Bury, Ld. Raym. 8.

[and remitted the appellant, (if aggrieved,) to his regular remedy in his majesty's Court of King's Bench.]

Hospitals are eleemosynary corporations. [These were considered by the popish clergy as of mere ecclesiastical jurisdiction; however the laws of the land judged otherwise; and with regard to these institutions it has long been held (*l*), that if the hospital be spiritual, the bishop shall visit—but if lay, the patron. The right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit (*m*).

Colleges in the Universities] (though, as before remarked, not the universities at large (*n*)) are also eleemosynary corporations; and, [(whatever the common law may now or might formerly judge,) were certainly considered by the popish clergy, under whose direction they were, as ecclesiastical, or, at least, as clerical corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most antient colleges, when the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of the colleges] of Oxford, where no special visitor is ap-

(*l*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

(*m*) 2 Inst. 725.

(*n*) Vide sup. p. 127; R. *v.* Cambridge, 3 Burr. 1656.

pointed, the Bishop of Lincoln, in whose diocese Oxford was formerly comprised, [has immemorially exercised visitorial authority; which can be ascribed to nothing else but his supposed title as ordinary, to visit these among other ecclesiastical foundations.]

[But whatever might be formerly the opinion of the clergy, it is now held as established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*l*);] and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown; that is, to the Lord Chancellor, sitting as the crown's representative in the Court of Chancery (*m*).

So much with respect to the persons by whom the different classes of corporations are respectively to be visited. With respect to the nature of a visitor's duties it may be laid down generally, that they are to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes—that, in the exercise of these duties, he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution—that, as to the course of proceeding, he is restrained to no particular forms (*n*),—and that, while he keeps within his jurisdiction, [his determinations as visitor are final, and examinable in no other court whatsoever (*o*).] Also it is said, [that where the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds these

(*l*) Philips *v.* Bury, Ld. Raym. 8.

(*m*) Rex *v.* Catherine Hall, 4 T.R. 233; Ex parte Wrangham, 2 Ves. jun. 609.

(*n*) See Bishop of Ely *v.* Bentley, 2 Bro. & C. 220; R. *v.* Bishop of Ely, 2 T. R. 290; Re Dean of York, 2 Q. B. 1.

(*o*) See Philips *v.* Bury, Ld. Raym. 5; S. C. 4 Mod. 106; Shaw, 35, 407; Salk. 403; Carth. 180; St. John's College *v.* Todington, 1 Burr. 200; R. *v.* Bishop of Ely, ubi sup.; R. *v.* Bishop of Worcester, 4 M. & S. 415.

[rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power (*p*).]

IV. [We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised or lose his place in the corporation, by acting contrary to the laws of the society or the laws of the land; or he may resign it by his own voluntary act (*q*). But the body politic may also itself be dissolved in several ways—which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*r*). The grant is indeed only during the life of the corporation, which *may* endure for ever—but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation] aggregate, [either to or from it, are totally extinguished by its dissolution (*s*);] for it has no longer a corporate character in which to sue or be sued, and as during its existence the members of it could not recover or be charged with the corporate debts in their natural capacities, so neither can they when it has ceased to exist.

[A corporation may be dissolved—1. By act of parliament, which is boundless in its operations.] And as to a corporation aggregate—[2. By the natural death of all its members.] 3. By the loss of such an integral part of its members as is necessary, according to the charter, to the validity of corporate elections; for in such cases the corporation has lost the power of continuing its own succes-

(*p*) 2 Lutw. 1556.

(*q*) 11 Rep. 98; see R. *v.* Liverpool, 2 Burr. 723; R. *v.* Harris, 1 B. & Adol. 936.

(*r*) Co Litt. 13.

(*s*) Edmunds *v.* Brown, 1 Lev. 237.

sion (*t*). [4. By surrender of its franchises into the hands of the sovereign, which is a kind of suicide. 5. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (*u*). And the regular course is to bring an information in the nature of a writ of *quo warranto* (*v*); to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James the second, particularly by revoking the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular: but the judgment against the charter of London was reversed by act of parliament (*x*) after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatever.]

We have already remarked, that there is a species of lay corporation, which is erected for the good government of a town (*y*). An institution of this kind has lately been termed a *municipal corporation;* and may be defined generally as a body politic or corporate, established in some town to protect the interests of its inhabitants as such, and the main-

(*t*) See 11 Geo. 1, c. 4, s. 5; R. v. Pasmore, 3 T. R. 199; R. v. Miller, 6 T. R. 268; R. v. Morris, 3 East, 813; S. C. 4 East, 17. But by 11 Geo. 1, c. 4, it is provided, that municipal corporations shall not be dissolved by the non-election or void election of the mayor or other chief officer on the day mentioned in the charter; and this is held to extend to other officers also. The provisions of this statute are expressly extended to elections under the Municipal Reform Act, by 7 Will. 4 & 1 Vict. c. 78, s. 26.

(*u*) R. v. Ponsonby, 1 Ves. jun. 8. See Eastern Archipelago Company v. The Queen, 2 Ell. & Bl. 856.

(*v*) As to a *quo warranto*, vide post, bk. v. c. XII.

(*x*) Stat. 2 W. & M. sess. 1, c. 8; vide R. v. Amery, 2 T. R. 515; S. C. in error, 4 T. R. 122.

(*y*) Vide sup. p. 127.

tenance of order therein; and consisting of the burgesses or freemen, that is, such persons as are duly and legally admitted as members of the corporate body.

The earlier history of the incorporation of the English towns (z) is involved in some degree of obscurity. What may be stated with certainty, however, is as follows.

First, a diligent examination of our antient historical remains will suffice to establish the point, that even prior to the Norman Conquest there existed, at least, the germ of municipal corporations in this country (a); it having been usual for such persons of free condition as were not land-owners, to settle in the towns and occupy houses there, as tenants to the crown, or some inferior lord, under the name of burgesses (b); to form themselves, by licence from the crown, (as many classes of persons did in that age,) into voluntary associations or fraternities, called *gilds*, or *guilds* (c); to be entitled in their capacity of burgesses to

(z) A full account of the establishment of the *communities* in Italy, France, Germany and Spain, is given in Robertson's Chas. V. vol. i. p. 33, notes xv., xvi., xvii., xviii. By this account it appears, that in France charters of date as early as A.D. 974 and 1025, are known to have been granted in favour of certain French towns, conferring liberties and privileges upon them; but the communities did not acquire the privilege of municipal government, and some other of the more important concessions, till the time of Louis the sixth, about A.D. 1120.

(a) Robertson says (ubi sup.), that in England, the establishment of communities or corporations was posterior to the Conquest, "and that "the practice was borrowed from "France:" This statement, however, seems to be incorrect. (See the authorities mentioned in the next note.) Indeed he himself adds, "that it is not improbable that some "of the towns in England were "formed into corporations under the "Saxon kings; and that the charters "granted by the kings of the Nor- "man race were not charters of en- "franchisement from a state of sla- "very, but a confirmation of privi- "leges which they already enjoyed." And he cites Lord Lyttleton's Hist. of Hen. 2, vol. ii. p. 317.

(b) Turner's Hist. Anglo-Sax. vol. iii. pp. 106, 107; Domesday Book, passim.

(c) As to gilds, vide supra, p. 130, n. (v). There seems reason to believe that gilds were always founded by the crown's licence. After the Conquest this was undoubtedly the case. (See Madox, Firma Burgi, p. 26.)

certain property (*d*); and, in the same capacity, to be exempt from certain burthens, and to be subject to certain liabilities (*e*). It is also clear, that very soon after the Conquest, and from thence downwards to the time of Henry the sixth, or thereabouts, charters were from time to time conceded by the Anglo-Norman Kings to the same towns (*f*), and to others, either confirming the former grants, or (as the case might be) conferring new ones; that by such charters the boroughs were frequently demised in fee farm to the burgesses (*g*); and these persons were also authorized to have a *guild-merchant* (*h*); to have officers, such as mayors, aldermen, bailiffs, and the like, for government of their towns (*i*); to hold courts of their own for administration of justice within the same precinct (*k*); and to enjoy many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation and from feudal oppressions.

And, lastly, we find that from about the reign of Henry the sixth to the present day, other charters of a similar character, (though varying of course with the change of times, as to the nature of the specific privileges conferred,) have been repeatedly granted to the same and to other towns by our different monarchs; but in a form more strictly adapted to the legal idea of an incorporation;

(*d*) This appears from some of the entries in the Domesday. Thus in Canterbury, burgesses "*de rege 33 acras prati in gildam suam.*" Domesday, p. 2.

(*e*) Domesday, passim.

(*f*) The enumeration of the towns particularly noticed in Domesday in reference to their services and customs, will be found in the Introduction to Domesday by Sir H. Ellis, vol. i. p. 191.

(*g*) Madox, Firma Burgi, p. 37.

(*h*) Thus Henry the second grants to the burgesses of Southampton, "*quod habeant et teneant gildam suam et omnes libertates et consuetudines,*" &c., and King John grants to Dunwich, "*hansam et gildam mercatoriam.*"—Madox, Firma Burgi, 27, where see other instances.

(*i*) Madox, Firma Burgi, 28, 116, 136, 139.

(*k*) See charter of Richard the first, granting to the burgesses of Colchester "*quod ipsi ponant de seipsis ballivos quoscunque voluerint et judiciarios ad sumandum placita coronæ nostræ et ad placitandum eadem placita infra burgum suum.*"—Ibid. 28.

these instruments containing an express grant that the mayor, bailiff, (or other officers,) and burgesses of the particular towns should be "a body corporate" by a certain name, and by that name have perpetual succession, and be competent to sue and be sued, and the like (*l*).

Under all these different grants a very large proportion of the different towns of England have successively become incorporated; but until a recent period their constitutions were in many respects defective, and of a nature liable to abuse; and being founded besides on charters granted by different kings at different times, (or on the immemorial custom applicable to each particular town where the charter was lost or silent,) were subject to a great and inconvenient variety of structure. To place these important institutions upon a more satisfactory and uniform basis, and to purify their internal economy, it was deemed necessary in the course of the last reign to pass an act "to regulate the municipal corporations in England and Wales" (*m*).

By this statute, 5 & 6 Will. IV. c. 76 (commonly called the Municipal Corporation Act), the corporate towns, or, as they are denominated in this statute, *boroughs* (*n*), enu-

(*l*) See the charters of Henry the sixth and Edward the fourth, cited ibid. Before the reign of Henry the sixth demises in fee farm, or other grants to burgesses, were to hold to them and their "heirs," or sometimes to their "successors or their "heirs." Ibid. 39.

(*m*) This act was preceded by the appointment of a commission (dated 18 July, 4 Will. 4), "to inquire into "the existing state of municipal cor-"porations in England and Wales, "and to collect information respect-"ing the defects in their constitu-"tion, &c." The first report of the commissioners, dated 30th March, 1835, contained the following statement: "There prevails among the "inhabitants of a great majority of "the incorporated towns a general, "and, in our opinion, a just dissa-"tisfaction with the municipal in-"stitutions—a distrust of the self-"elected municipal councils, whose "powers are subject to no popular "control, and whose acts and pro-"ceedings being secret are not "checked by the influence of public "opinion—a distrust of the muni-"cipal magistracy, tainting with sus-"picion the local administration of "justice—a discontent under the "burthen of local taxation, while "revenues are diverted from their "legitimate use," &c. (First Report, p. 49.)

(*n*) The term *borough* is employed

merated in the schedules A. and B. annexed thereto, (comprising, with the exception of London and a few other places, the whole of those in England and Wales (*o*),) are placed under one uniform plan of constitution thereby newly devised. According to this plan, the definition of a *burgess* (*p*) in the boroughs comprised in the act (that is, a burgess entitled to such new rights as the act for the first time confers on those boroughs (*q*),) is a male person of full age, not an alien, nor having received within the last twelve months parochial relief, or alms, or pensions, or charitable allowance from the charitable trustees of the borough; who on the last day of August in any year shall have occupied any house, warehouse, counting-house or shop within the borough, during that year and the whole of the two preceding years; and during such occupation shall also have been an inhabitant householder within the borough, or within seven miles thereof; and shall during such time have been rated in respect of such premises to all rates for relief of the poor (*r*), and have paid all such rates and all

in this act in a somewhat novel sense. It seems originally to have signified a town of note or importance, but generally in later times a town sending members to parliament. (Vide sup. vol. I. p. 124, n. (*s*); Madox, Firma Burgi, p. 2.) And it is used in that sense in the Reform Act, 2 Will. 4, c. 45, s. 79. In neither of these applications of the word did it necessarily involve the idea of a municipal corporation.

(*o*) The act provides, that nothing therein contained shall alter or affect the rights of the universities of Cambridge, Oxford, or Durham, or the jurisdiction over precincts of cathedrals (s. 138), or the letters-patent granted to the Grammar School at Louth (s. 137). It also contains several savings as to the dock-yards, &c., (s. 89,) and the Cinque Ports (ss. 108, 134, 135). As to the *boundaries* of the boroughs to which the act applies, and of the wards thereof, vide 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41.

(*p*) See 5 & 6 Will. 4, c. 76, ss. 9, 13. Before this Act the title of burgess, (or the *freedom* as it was called,) was generally acquired by birth, marriage or servitude, that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman. It might also be obtained by gift or purchase. (First Report of Commissioners, pp. 18, 19.)

(*q*) 5 & 6 Will. 4, c. 76, s. 13.

(*r*) See R. *v.* Bridgenorth (Mayor), 10 Ad. & E. 66; R. *v.* Eye (Mayor), 9 Ad. & E. 670.

borough rates in respect of the same premises, except those payable for the last six calendar months; and shall be duly enrolled in that year as a burgess on the *burgess roll* (s). Which definition however is to be understood as subject to the following rule, that when the premises came to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office,—he shall be entitled to reckon in the occupancy and rating of the former party from whom they were so derived (t).

The new municipal constitution farther provides, that in every borough there shall be elected annually a "mayor" (u), and periodically a certain number of "aldermen" (x), and of "councillors" (y), who together shall constitute "the council" (z) of the borough (a);—that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list, and otherwise qualified as in the act described (b):—that the councillors shall be elected by the

(s) As to the burgess roll, see 5 & 6 Will. 4, c. 76, s. 22; 7 Will. 4 & 1 Vict. c. 78; 20 & 21 Vict. c. 50; R. v. Hardwich (Mayor), 8 Ad. & E. 919; Queen v. Mayor of Dover, 11 Q. B. 260; Queen v. Dixon, 15 Q. B. 33; R. v. Kidderminster, 2 L. M. & P. 201; Clarke v. Gant, 8 Exch. 252.

(t) 5 & 6 Will. 4, c. 76, s. 12; 7 Will. 4 & 1 Vict. c. 78, ss. 8, 9.

(u) 5 & 6 Will. 4, c. 76, s. 49. The case of the death, illness, absence, or incapacity of the mayor or other municipal officers is provided for by 5 & 6 Will. 4, c. 76, ss. 36, 49; 7 Will. 4 & 1 Vict. c. 78, s. 16; 16 & 17 Vict. c. 79, ss. 7—12. By 6 & 7 Will. 4, c. 105, s. 4, the mayor is to hold over after his year, till acceptance of office by his successor. By 3 & 4 Vict. c. 47, the mayor may be re-elected. By 16 & 17 Vict. c. 79, ss. 7, 8, he may appoint a deputy.

(x) 5 & 6 Will. 4, c. 76, s. 25. See 16 & 17 Vict. c. 79, s. 13.

(y) 5 & 6 Vict. c. 76, ss. 25, 31.

(z) As to the powers of the council, see sects. 72, 73; 6 & 7 Will. 4, c. 104, s. 2; 6 & 7 Will. 4, c. 105, s. 8; 7 Will. 4 & 1 Vict. c. 78, ss. 45, 46, 47; Staniland v. Hopkins, 9 Mee. & W. 178.

(a) 5 & 6 Will. 4, c. 76, s. 25.

(b) Sect. 28. Vide 6 & 7 Will. 4, c. 104, s. 7. Since the Municipal Act there have been several additional statutes regulating the subject of municipal elections. Vide 6 & 7 Will. 4, c. 105, s. 5; 7 Will. 4 & 1 Vict. c. 78, ss. 1, 11, 14, 18, 25, 26; 3 & 4 Vict. c. 47, s. 1; 6 & 7 Vict. c. 89, ss. 1, 2, 3, 5; 15 & 16 Vict. c. 5; 16 & 17 Vict. c. 79, ss. 9—13. See also 1 & 2 Vict. cc. 5, 15, as to the relief of Quakers, Moravians and Separatists; and 8 & 9 Vict. c. 52, by which Jews are now rendered capable of being elected to municipal offices.

burgesses (c), and the mayor and aldermen by the council (d);—that the council shall meet once a quarter (and oftener if due notice be given), for transaction of the general business of the borough (e), and make their decisions according to the majority of the members present (if those present amount to one-third of the whole), and that the mayor, or other member presiding in his absence, shall have a casting vote (f);—that at any meeting at which two-thirds at least of the whole shall attend, the council may make bye-laws for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (g);—that the burgesses shall annually elect, from among those qualified to be councillors, two auditors and two assessors (h): the former to audit the accounts of the borough, the latter to assist in revising the burgess list (i);—and that the council also may appoint a town clerk and a treasurer (neither of whom is to be a member of the council), and such other officers as have been usual or shall be necessary, and shall be empowered

(c) 5 & 6 Will. 4, c. 76, ss. 29, 30, 32, (as to which provisions, see Harding v. Stokes, 1 Mee. & W. 354; S. C. 2 Mee. & W. 233; R. v. Oxford, 6 A. & E. 349; Queen v. Hammond, 17 Q. B. 772.) It is to be observed that certain boroughs of large population are by the act divided into a certain number of *wards* (see 5 & 6 Will. 4, c. 76, s. 39; 6 & 7 Will. 4, c. 103, s. 3; Baker v. Marsh, 4 Ell. & Bl. 144), and it is provided that a certain number of councillors shall be assigned to each ward, and that the burgesses of each ward and none others shall separately elect the number of councillors assigned thereto (5 & 6 Will. 4, c. 76, s. 43.) Two assessors are also to be separately elected for each ward. (Ibid.)

(d) 5 & 6 Will. 4, c. 76, ss. 49, 25. See as to the election of an outgoing alderman to be mayor, R. v. Stanley, 3 Per. & D. 561. As to the election to the office of alderman, R. v. Brightwell, 10 A. & E. 171; R. v. Deighton, 5 Q. B. 896; R. v. Bradford, 20 L. J., Q. B. 226. As to the disqualification of a councillor, &c. in respect of a contract or office of profit, see R. v. York, 2 Gale & D. 105; 5 & 6 Vict. c. 104.

(e) 5 & 6 Will. 4, c. 76, s. 69.

(f) Ibid.

(g) Ibid.

(h) Sects. 37, 29.

(i) Sects. 93, 18. By 7 Will. 4 & 1 Vict. c. 78, s. 15, the auditors and assessors are disqualified to be of the council; by sect. [illegible] the assessor may appoint a deputy.

to fix their salaries (*k*),—and, if the borough have a separate court of quarter sessions, shall also appoint a coroner (*l*) and a clerk of the peace (*m*).

The council also of any borough which is desirous that a separate court of quarter sessions (*n*) should be holden there, may petition the Crown for that purpose; and if the application be granted, the Crown shall appoint a recorder, who shall be sole judge of such court of quarter sessions; as also of the court of record for civil actions, if there be any, and if it be not regulated by any local act of parliament and no barrister of five years' standing sat therein when the act passed (*o*).

To certain boroughs, and to such others as may petition for it, the Crown may also grant a commission of the peace, and nominate such persons to be justices as the Crown shall think proper (*p*); and the mayor and recorder are respectively justices of the peace *ex officio* (*q*).

(*k*) 5 & 6 Will. 4, c. 76, s. 58. As to the town clerk, see R. *v.* Simkins, 5 A. & E. 423; Jones *v.* Carmarthen (Mayor), 8 Mee. & W. 685; 20 & 21 Vict. c. 50, s. 5. As to the treasurer, see 6 & 7 Vict. c. 89, s. 6.

(*l*) 5 & 6 Will. 4, c. 76, s. 62. By 6 & 7 Will. 4, c. 105, s. 6, the coroner may appoint a deputy.

(*m*) 5 & 6 Will. 4, c. 76, s. 103. The clerk of the peace may appoint an assistant, 7 Will. 4 & 1 Vict. c. 19.

(*n*) 5 & 6 Will. 4, c. 76, s. 103. As to borough courts of quarter sessions, see also 6 & 7 Will. 4, c. 105; 2 & 3 Vict. c. 27; 7 Will. 4 & 1 Vict. c. 38; 14 & 15 Vict. c. 55, ss. 13, 19; c. 91. As to petty sessions of the peace in boroughs, see 12 & 13 Vict. c. 18; 18 & 19 Vict. c. 126. As to trial in the county at large, or next adjoining county, of offences committed within the borough, see 38 Geo. 3, c. 52, ss. 2, 3; 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 14; 5 & 6 Will. 4, c. 76, ss. 109—111; 7 Will. 4 & 1 Vict. c. 78, s. 50; 14 & 15 Vict. c. 55, s. 19; c. 100, s. 23; 17 & 18 Vict. c. 35. As to offences not triable at quarter sessions, whether in counties or boroughs, 5 & 6 Vict. c. 38.

(*o*) 5 & 6 Will. 4, c. 76, ss. 105, 118. The recorder may appoint a deputy without consent of council, 6 & 7 Vict, c. 89, s. 8. As to the recorder's oath, 6 & 7 Will. 4, c. 105, s. 3. As to his claim for salary, see Addison *v.* The Mayor, &c. of Preston, 12 C. B. 108. As to borough courts for civil actions, see 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, s. 31; 2 & 3 Vict. c. 27; 15 & 16 Vict. c. 76, s. 228; 17 & 18 Vict. c. 125, s. 105.

(*p*) 5 & 6 Will. 4, c. 76, s. 98. And see as to borough justices, 7 Will. 4 & 1 Vict. c. 78, ss. 30, 31; 12 & 13 Vict. cc. 8, 18, 64; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 38.

(*q*) 5 & 6 Will. 4, c. 76, ss. 57, 10.

It is provided also, that generally, and subject to certain exceptions, the council shall not sell or mortgage the land or public stock of the borough, or demise them for more than a certain term (*r*): and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and carried to the account of the borough fund (*s*); which, after discharging debts, shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, gaols and maintenance of offenders, and other public purposes (*t*)—that the surplus (if any) shall be expended for the public benefit of the inhabitants (*u*), and the deficiency (if any) made up by a rate (*x*),—and that the accounts shall be at all times open

(*r*) 5 & 6 Will. 4, c. 76, ss. 94, 95, &c. As to the power of leasing, see 6 & 7 Will. 4, c. 104, s. 2. As to the sale of the right of nomination by the council to church patronage, &c., see 1 & 2 Vict. c. 31.

(*s*) As to the borough fund, see 5 & 6 Will. 4, c. 76, s. 92; 6 & 7 Will. 4, c. 104; R. *v.* Ledgard, 1 A. & E. N. S. 16. As to property held by corporations on charitable or other trusts, see 5 & 6 Will. 4, c. 76, ss. 71—75; 16 & 17 Vict. c. 137, s. 65. As to discharge of corporate debt, see 7 Will. 4 & 1 Vict. c. 78, s. 28.

(*t*) 5 & 6 Will. 4, c. 76, s. 92. As to borough prosecutions and maintenance of offenders, see ibid. ss. 114, 117; 5 & 6 Vict. c. 98; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 81, s. 38; R. *v.* Bridgwater (Council), 2 Per. & D. 558; Attorney-General *v.* Norwich (Mayor), 2 Mylne & C. 406. As to borough police, 11 & 12 Vict. c. 14; 19 & 20 Vict. cc. 69, 118. As to borough gaols, 6 & 7 Will. 4, c. 105, s. 1; 7 Will. 4 & 1 Vict. c. 78, s. 37; 5 & 6 Vict. cc. 53, 98; 7 & 8 Vict. c. 50; 7 & 8 Vict. c. 93; 11 & 12 Vict. c. 39; 12 & 13 Vict. c. 82; 13 & 14 Vict. c. 91. As to lunatic asylum for boroughs, 16 & 17 Vict. c. 97; 18 & 19 Vict. c. 105; 19 & 20 Vict. c. 87. As to pauper lunatics, 18 & 19 Vict. c. 105, s. 14. As to bridges, maintainable by boroughs, 13 & 14 Vict. c. 64. As to burials in boroughs, 17 & 18 Vict. c. 87, s. 3; 18 & 19 Vict. c. 128. As to grants, by the council, of sites for sailors' homes, 17 & 18 Vict. c. 104, s. 546.

(*u*) As to the establishment, in boroughs, of free public libraries and museums, see 18 & 19 Vict. c. 70 (repealing 13 & 14 Vict. c. 65).

(*x*) 5 & 6 Will. 4, c. 76, s. 92. As to levying borough rate and watch rate, see 6 & 7 Will. 4, c. 104, s. 5; 7 Will. 4 & 1 Vict. c. 78, s. 29; 7 Will. 4 & 1 Vict. c. 81; 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28; 8 & 9 Vict. c. 110. As to rating the corporate property to poor rates, see 4 & 5 Vict. c. 48. As to overseers of the poor and authority of borough justices in matters relating to the poor, 12 & 13 Vict. cc. 8, 64; 15 & 16 Vict. c. 38; 16 & 17 Vict. c. 79, s. 14. As to the collection of borough rate for parishes partly within

to inspection, and regularly audited and printed for the use of the ratepayers (y); and submitted to the Secretary of State; and laid before both Houses of Parliament (z).

Such are the principal features of the new municipal corporation scheme, as to which however it is further to be understood, that it distinguishes between the rights newly conferred by the act, and the antecedent rights of the corporators with regard to the corporate property; and with regard to voting at parliamentary elections: both which antecedent rights are expressly preserved. For it is provided that every inhabitant; and every person admitted a freeman or burgess; and the wife or widow, or son or daughter of any freeman or burgess; and every person married to the daughter of a freeman or burgess; and every apprentice;—shall enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the act had not been passed: subject to the limitation, however, that the total amount to be divided among such persons shall not exceed the surplus which shall remain after payment of the expenses which are charged by the act upon the borough fund (a). And further, that every person who if the act had not been passed would have enjoyed as a burgess or freeman, or might thereafter have acquired in respect of birth or servitude, the right of voting in the election of members of parliament, shall be entitled to enjoy or acquire such right of voting as fully as he might in that case have done (b). It is also enacted that the town clerk of every borough shall make out a list

and partly without boroughs not subject to county rate, 12 & 13 Vict. c. 65, s. 2; 15 & 16 Vict. c. 81, s. 32. As to borough rates in boroughs not within the Municipal Corporation Act, and not liable to county rate, 17 & 18 Vict. c. 71.

(y) 5 & 6 Vict. c. 76, s. 93.

(z) 6 & 7 Will. 4, c. 104, s. 10; 7 Will. 4 & 1 Vict. c. 78, ss. 43, 49.

(a) 5 & 6 Will. 4, c. 76, s. 2.

(b) Sect. 4. Vide 7 Will. 4 & 1 Vict. c. 78, s. 27. See also as to the right of voting for boroughs, in respect of an occupation to the value of 10*l.*, 2 Will. 4, c. 45, s. 27; sup. vol. II. pp. 365, 367.

(to be called *the freemen's roll*) of all persons admitted burgesses or freemen for the purpose of such reserved rights as aforesaid (*c*),—as distinguished from the burgesses newly created by the act, and entitled to the rights which it newly confers; these last are to be entered, (as before explained,) on another roll, called the *burgess roll*.

There are some other points of importance, besides these already noticed, on which the act has innovated upon the laws and customs which formerly prevailed in corporate towns. It enacts that no person shall in future be made a burgess or freeman by gift or purchase (*d*);—the effect of which provision is to leave no other title in force, as regards the right to be placed on the freemen's roll, but those of birth, marriage, and servitude as an apprentice (*e*). It abolishes also (though with a reservation of the rights of the then existing claimants) the exemptions that had been ordinarily claimed by burgesses, inhabitants, or the like, from such tolls or dues as are levied to the use of the body corporate (*f*). And whereas in divers boroughs a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandize, or use certain trades or occupations for gain within the same,—the act provides that every person may in future keep any shop, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*g*).

It remains only to observe, that the several provisions of this act are applicable not only to the boroughs enumerated in the schedules, but to every other (whether before

(*c*) 5 & 6 Will. 4, c. 76, s. 5. By 1 & 2 Vict. c. 35, no stamp duty is to be paid on any such admission.

(*d*) 5 & 6 Will. 4, c. 76, s. 3.

(*e*) Sect. 5. As to the right of persons on the freemen's roll to vote for members of parliament, however, it is to be observed, that it belongs to those only who have been admitted by birth or servitude, as stated above, and no longer to those admitted by marriage.

(*f*) Sect. 2. Vide 6 & 7 Will. 4, c. 104, s. 9.

(*g*) 5 & 6 Will. 4, c. 76, s. 14.

incorporated or not) which shall obtain a new charter of incorporation, after petition to the crown for that purpose (*h*): and that with respect to every borough falling within the act, the former statutes, charters and usages by which it was governed, so far as consistent with these provisions, are to be considered as still in force; while on the other hand, so much of them as is inconsistent with the act is in express terms repealed (*i*).

(*h*) 5 & 6 Will. 4, c. 76, s. 141. As to boroughs incorporated since the Municipal Corporation Act, see also 7 Will. 4 & 1 Vict. c. 78, s. 49; 5 & 6 Vict. c. 111; 11 & 12 Vict. c. 93; 13 & 14 Vict. c. 42; 16 & 17 Vict. c. 79; 18 & 19 Vict. c. 31; 20 & 21 Vict. c. 10.

(*i*) 5 & 6 Will. 4, c. 76, s. 1.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.

[THE poor of England, till the time of Henry the eighth, subsisted entirely upon private benevolence, and the charity of well-disposed Christians (*a*). For though it appears by the Mirror (*b*), that by the common law the poor were to be "sustained by parsons, rectors of the church, and the "parishioners, so that none of them die for default of suste-"nance,"] yet [till the statute 27 Hen. VIII. c. 25, we find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But before the total

(*a*) The poor in *Ireland* had till of late no relief but from private charity. But by 1 & 2 Vict. c. 56, the authority of the Poor Law Commissioners was extended to that part of the realm. This last act has been amended by 2 & 3 Vict. c. 1; 4 & 5 Vict. c. 41; 6 & 7 Vict. c. 92; 10 & 11 Vict. cc. 31, 90; 11 & 12 Vict. c. 25; 14 & 15 Vict. c. 68; 15 & 16 Vict. c. 37. And by 10 & 11 Vict. c. 90, a board of commissioners for administering the laws for relief of the poor in Ireland is established, distinct from the commissioners for England. See also the following temporary statutes which have been recently passed for the alleviation of distress caused by a late failure of crops in Ireland, 9 & 10 Vict. cc. 6, 107; 10 & 11 Vict. cc. 7, 10, 22, 55; 11 & 12 Vict. c. 106. As to the relief of the poor in *Scotland*, see 8 & 9 Vict. c. 83; 17 & 18 Vict. c. 86, s. 6; 19 & 20 Vict. c. 117.

(*b*) Chap. 1, sect. 3.

[dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom; and abundance of statutes were made in the reigns of King Henry the eighth and his children, for providing for the poor and impotent, which, the preambles to some of them recite, had of late years greatly increased.

These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. To provide in some measure for both of these in and about the metropolis, Edward the sixth founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent, through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor law,) overseers of the poor were appointed in every parish.] It is provided by this statute, that the churchwardens of every parish (*c*) shall be overseers of the poor: and that, besides these, there shall be appointed as overseers in each parish two, three, or four, but not more, of the inhabitants (*d*): such last-mentioned overseers to be substantial householders, and to be nominated yearly by two justices dwelling near the parish (*e*).

(*c*) As to churchwardens and overseers for separate *townships*, see R. *v.* Justices of North Riding of Yorkshire, 6 A. & E. 863; R. *v.* Worcestershire, 1 W. W. & H. 432; and 7 & 8 Vict. c. 101, ss. 22, 23.

(*d*) The following classes of persons are exempted from serving the office of overseers. Peers and members of parliament, justices of the peace, aldermen of London, clergymen, dissenting ministers, practising barristers and attornies, members of the college of physicians and surgeons, apothecaries, officers of the courts of law, of the army and navy, and of the customs and excise. Vide Archbold's Justice of the Peace (Poor), 13. By 12 & 13 Vict. c. 103, s. 6, no person shall be appointed overseer who is engaged in any contract for the supply of food for the relief of the poor.

(*e*) The appointment is directed to

[Their office and duty, according to the same statute, were principally these:] first, to provide work for all persons who had no means to maintain themselves, and used no ordinary trade; and, secondly, to raise competent sums for the necessary relief of the lame, impotent, old, blind, and such other persons as were poor and not able to work. [For these joint purposes they were empowered to make and levy rates upon the several inhabitants of the parish by the same act of parliament; which has been farther explained and enforced by several subsequent statutes.]

The act, it will be observed, involved two principles; first, that every poor person should be either relieved, or (what is equivalent) provided with work; next, that this should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes (*f*). It is to be understood, however, that the law did not allow paupers to resort for relief indiscriminately to any parish they preferred; for by certain statutes of date anterior to the forty-third year of Elizabeth (*g*), persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled*, that is, where they were born, or had made their abode for three years, or (in case of vagabonds) for one year only (*h*). And this was the origin of the law of *set-*

be made on the 25th March, or within fourteen days after, by 54 Geo. 3, c. 91. It may be observed here, that wherever, by 43 Eliz. c. 2, powers are given in respect of the poor to justices in *counties*, the same powers are by 12 & 13 Vict. c. 8, c. 64, (amended by 15 & 16 Vict. c. 38,) given to justices in *boroughs*.

(*f*) As to extra-parochial places, vide 13 & 14 Car. 2, c. 12, s. 22, and the recent act of 20 Vict. c. 19; by which last all extra-parochial places where no poor rate is levied, and in respect of which there is no agreement for its contribution to the poor rate of any parish, shall now be deemed a parish for all the purposes of assessment to the poor rate, the relief of the poor, the county police or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths.

(*g*) 19 Hen. 7, c. 12; 1 Edw. 6, c. 3; 3 & 4 Edw. 6, c. 16; 14 Eliz. c. 5, see also 7 Jac. 1, c. 4, s. 8.

(*h*) 1 Bl. Com. 361.

tlement, with which that of *relief* holds a close connection, these being in fact the two main branches of which the poor-law (as established by the act of Elizabeth) consists. Still there was no regulation either prior to that act, or for a long period afterwards, to prevent an able-bodied and industrious pauper from resorting to any parish that he pleased for employment. But soon after the Restoration the more restrictive principle was introduced, of confining to his existing place of settlement every person whatever whose circumstances were such as to make it probable that he would become a charge upon the public; and new regulations were devised for carrying that principle into full effect. For by stat. 13 & 14 Car. II. c. 12, s. 1, it was provided (in substance) that persons newly coming to settle in any parish, and likely to become chargeable, might be *removed* by the warrant of two justices of the peace, on complaint of the parish officers, to the parish where they were last legally settled (*i*). But that act also materially altered the legal idea and definition of settlement, for it abridged the period, at which a man becomes settled by residence, to forty days (*k*); and as it subjected the poor to removal from every place in which they were not settled, it had the farther and indirect effect of attaching to the condition of settlement the quality of a *right*, because that condition gave an exemption from removal. This state of the law led to unforeseen consequences. Persons who were desirous (for any reason) of gaining a settlement-right in particular parishes, were soon found to resort to the expedient of intruding into them furtively, with the view of completing their forty days' residence before they should be discovered (*l*). To prevent this, provision was afterwards made that the forty days should be computed only

(*i*) In R. v. Inhabitants of St. James, in Bury St. Edmunds, 10 East, 31, Bayley, J. says, "that before the statute of Charles the "second a settlement was gained by "mere inhabitancy, and the statute "was passed to prevent this."

(*k*) 1 Bl. Com. 362; see Jac. 2, c. 17, s. 3.

(*l*) Ibid.

from the period when notice in writing of the party's new abode should be given to the parish officers; such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*m*). At a subsequent period, however, the principle of giving notice was abandoned altogether (*n*); but the circumstances of notoriety remained, and some of them still remain, (as we shall in the course of this chapter explain more particularly,) indispensable accompaniments of the forty days' residence, so that without them no settlement can be gained. Other consequences in the mean time flowed from the principle that settlement was in the nature of an acquired right; for it became established by a series of judicial decisions, that (like other rights) it might be claimed *derivatively*, that is, that the child was entitled to the parent's settlement, and the wife to the husband's (*o*); and this addition completes the outline of the settlement law as it still exists,—subject, however, to one very important alteration introduced in the reign of George the third (*p*), viz. that a man coming to settle in a parish is no longer liable to removal upon the mere *probability* of his becoming chargeable, but it is required that he should have actually become chargeable, by receiving or applying for relief; an alteration (it may be observed) which reverts in some measure to the principle of the system as it stood anterior to the statute of Charles the second.

The law as to *relief* was stationary to a much later

(*m*) Ibid.; and 3 W. & M. c. 11.

(*n*) 35 Geo. 3, c. 101, s. 3.

(*o*) Fort. 313; 1 Nol. 274.

(*p*) 35 Geo. 3, c. 110, s. 1. Even prior to this act, if a *certificate* were granted by the officers of one parish to the officers of another, that a particular person was legally settled in the former parish, he was entitled by virtue of such certificate to go to reside in the latter, without being liable to removal, except in the event of becoming actually chargeable; and on the other hand could not, during such residence, acquire a settlement there by any act of his own, except by renting a tenement, or executing an annual office; nor could his servant or apprentice. See 8 & 9 Will. 3, c. 30; 9 & 10 Will. 3, c. 11; 12 Ann. c. 18, s. 2; 3 Geo. 2, c. 29, ss. 8, 9.

period, though it has latterly undergone fundamental alterations of the greatest importance. Not only the collection of the rate, but the relief of the poor, with all its attendant management, was long left (conformably to the institution of the statute of Elizabeth) to the overseers of the respective parishes. But these officers were found unequal to the proper discharge of the latter duty. In modern times at least, when, by the gradual increase of population and of paupers, its services had become more onerous, they were rarely performed to the satisfaction of the public; and various measures were from time to time devised by the legislature, for improvement of the practical system. By the statute 22 Geo. III. c. 83 (commonly called Gilbert's Act (*q*), parishes were authorized by consent of two-third parts in number and value of the owners or occupiers, with the approbation of two justices of the peace, to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor; and also to enter into voluntary unions with each other for the more convenient accommodation, maintenance and employment of paupers. This was followed by the statute called "The Select Vestry Act," or "Sturges Bourne's Act," 59 Geo. III. c. 12 (*r*); by which the inhabitants of any parish, in vestry assembled (*s*), were enabled to commit the management of its poor, to a committee of the parishioners appointed for that purpose, and called a select vestry; to whose orders the overseers are bound to conform.

But these new methods, though found to be beneficial, were upon the whole not attended by results sufficiently effective. Their introduction, too, not being made compulsory by law, but left to the option of the inhabitants, the conflict of opinions which generally attends all subjects

(*q*) See Henderson *v.* Sherborne, 2 M. & W. 239; R. *v.* Poor Law Commissioners, *in re* Whitechapel Union, 6 Ad. & E. 49.

(*r*) See Archbold's Poor Law Act, p. 46 (*n*); Report on Local Taxation, p. 55.

(*s*) As to vestries, see also sup. vol. I. pp. 120, 121.

of political economy, or the dislike of change, or some inactivity in the public mind, prevented their adoption in the great majority of the parishes.

In the meantime the evils resulting from the mismanagement of the poor continued to increase.

The negligent and injudicious administration of the parochial funds, which prevailed in various parts of the kingdom, had the effect of withdrawing from the impotent poor part of the provision intended for them by law, and wasting it on those who were able, but unwilling to work; and this led by natural consequence to the encouragement of idleness, improvidence and vice among the lower classes of society, and to a progressive and alarming increase in pauperism and in the amount payable for poor rates.

The case was aggravated by some inherent defects in the existing system, which, while it remained unaltered in principle, tended strongly to prevent its practical improvement.

For the duty of executing the poor law being upon this system left in every instance to the parish itself, which stood in no subordination, and owed no deference, to any external authority, reforms suggested from without seldom met with much attention, and little benefit was derived from any example of superior management exhibited in other parts of the kingdom. The size of a very large proportion of the parishes was also in general so limited, as to expose them to great disadvantages, both as to the employment and maintenance of the poor; the difficulty and expense of which are both obviously reduced, when the field of operation is wider, and provision can be made on a larger scale. It was under such circumstances that parliament recommended, in the year 1833, the issuing of a royal commission for inquiring into the state and administration of the laws relating to the poor. The persons to whom that task was confided exposed the evils of the existing system with great ability and effect; and from the views which they succeeded in impressing upon parliament,

emanated the important statute 4 & 5 Will. IV. c. 76 (*t*), commonly denominated "The Poor Law Amendment Act."

By this statute the administration of the parochial funds, and the management of the poor throughout the country, were placed for a period of five years under the superintendence and control of a central board, called "The Poor Law Commissioners;" who had power to make such regulations as they thought proper, for guidance of the parochial authorities, (whether consisting of guardians, select vestries, or overseers,) in all matters of that description; and who were aided in their operations by a certain number of assistant commissioners (*u*). This commission was subsequently extended to the year 1847, and was then superseded. But in lieu thereof a new board of Commissioners was established (for five years), by 10 & 11 Vict. c. 109, under the style of "Commissioners for administering the Laws for the relief of the Poor in England;" to consist of the lord president of the council, the lord privy seal, the principal secretary of state for the home department, and the chancellor of the exchequer for the time being, in virtue of their offices, and of such other persons as her Majesty by letters-patent or commission shall appoint; and to this board (which has since received the appellation of the "Poor Law Board," (*x*), and been continued for a further period (*y*),) all the powers and duties of the former

(*t*) The following are the statutes which have been passed since the 4 & 5 Will. 4, c. 76, for the continuation and amendment of the system thereby introduced: 5 & 6 Will. 4, c. 69; 6 & 7 Will. 4, c. 107; 7 Will. 4 & 1 Vict. c. 50; 1 & 2 Vict. cc. 25, 56; 2 & 3 Vict. c. 83; 2 & 3 Vict. c. 84; 3 & 4 Vict. c. 42; 5 & 6 Vict. c. 57; 7 & 8 Vict. c. 101; 10 & 11 Vict. c. 109; 11 & 12 Vict. cc. 31, 82, 110, 111; 12 & 13 Vict. cc. 13, 103; 13 & 14 Vict. cc. 11, 101; 14 & 15 Vict. c. 105; 15 & 16 Vict. cc. 14, 59; 20 Vict. c. 19.

(*u*) As to the appointment of the poor law commissioners, &c. see also 1 & 2 Vict. c. 56, s. 119; 5 & 6 Vict. c. 57, s. 2.

(*x*) 12 & 13 Vict. c. 103, s. 21.

(*y*) By 17 & 18 Vict. c. 41, the board is continued till 23 July, 1859, and thenceforth to the end of the then next session of parliament.

poor law commissioners are transferred (z). The person first named in such letters-patent or commission is "President" (a); and all *general rules*—a term which, for the purposes of this act, is declared to extend to all rules directed to affect more than one union (b),—promulgated by this commission, must be under the seal of the body, and under the hands of a quorum, of whom the president must be one; and any such rule may be disallowed by her Majesty in council (c). They are, moreover, directed, once in every year, to submit to both houses of parliament a general report of their proceedings (d). By the Poor Law Amendment Act, in connection with the new act of 10 & 11 Vict., which we have just noticed, the commissioners are empowered, where they think it desirable, to direct that the relief of the poor in any parish shall be administered by a board of guardians; to be elected by the owners of property and ratepayers in such parish (e), in such manner as in the acts particularized. And they are directed to appoint a certain number of Inspectors, for the purpose of exercising a visitorial power over workhouses (f), and of being present at meetings of guardians, or other local meetings held for the relief of the poor (g).

(z) 10 & 11 Vict. c. 109, s. 10.

(a) The *president* and two *secretaries* appointed by the commissioners receive remuneration for their services. The office of president is declared not to be one inconsistent with a seat in the House of Commons; but only *one* of the secretaries may sit and vote there at the same time; (10 & 11 Vict. c. 109, ss. 8, 9.)

(b) Ibid. s. 15.

(c) Sect. 17. As to the removal of rules or orders of the commissioners by certiorari into the court of Queen's Bench, see 11 & 12 Vict. c. 110, s. 4; 12 & 13 Vict. c. 103, s. 13. Westbury-on-Severn Union case, 4 Ell. & Bl. 314.

(d) 10 & 11 Vict. c. 109, s. 13.

(e) 4 & 5 Will. 4, c. 76, ss. 39, 40; Robinson v. Todmorden Union (in error), 3 Q. B. 675.

(f) By 12 & 13 Vict. c. 13, the superintendence of the Poor Law Board, and their power of visitation, appointing inspectors, regulations, &c. are extended to the case of poor persons lodged and maintained by contract, in establishments not lunatic asylums or workhouses of any union or parish, or under the effective control of any parochial or other local authorities.

(g) 10 & 11 Vict. c. 109, ss. 18, 20.

They are also entrusted by the legislature with the important power of consolidating at their own discretion, so far as the relief and management of the poor is concerned, several parishes into one united body, or *union;* under the government of a single board of guardians (*h*), to be elected by the owners and ratepayers of the component parishes (*i*): and the united parishes are to have a common workhouse provided and maintained at their common expense (*k*), though each is to remain separately chargeable with the expense of its own poor, whether relieved in or out of such workhouse (*l*). The principle of consolidation may indeed be carried farther, if such a measure shall appear expedient to those who represent the different parochial interests; for by consent of the guardians in any union, (whether formed under the act, or previously existing,) the component parishes may (under sanction of the commissioners) be united for the purposes of settlement and of rating, as well as that of relief and manage-

(*h*) 4 & 5 Will. 4, c. 76, s. 38. By 7 & 8 Vict. c. 101, s. 24, county justices residing in a union or parish are to be guardians *ex officio.* By 12 & 13 Vict. c. 103, s. 19, the chairman at any meeting of the board of guardians is to have a casting vote. By the acts as to marriage and registration (6 & 7 Will. 4, cc. 85, 86, and 7 Will. 4 & 1 Vict. c. 22), the Metropolitan Police Act (2 & 3 Vict. c. 71, s. 41), the act for protection of apprentices and servants (14 & 15 Vict. c. 11), and the County Rate Act (15 & 16 Vict. c. 81),—the guardians are now intrusted with various other duties in addition to those connected with the administration of the poor law.

(*i*) As to their election, see 7 & 8 Vict. c. 101, ss. 14—21; 14 & 15 Vict. c. 105, ss. 2, 3.

(*k*) 4 & 5 Will. 4, c. 76, ss. 26, 28. See 5 & 6 Will. 4, c. 69; 7 Will. 4 & 1 Vict. c. 50; 7 & 8 Vict. c. 101, s. 73, as to the conveyance of workhouses and other property of parishes and unions; 7 & 8 Vict. c. 101, s. 56, as to the parish where the workhouse shall for certain purposes be deemed situate; 20 & 21 Vict. c. 13, to facilitate the procuring of sites for workhouses in certain cases.

(*l*) 4 & 5 Will. 4, c. 76, s. 26. See 2 & 3 Vict. c. 84, as to the manner of recovering from each of the united parishes its contribution; and 11 & 12 Vict. c. 110 (post, p. 174), as to the cases in which, by exception from the general rule, the expense is thrown not on the individual parish, but on the common fund of the union.

ment (*m*). On the other hand, however, it is provided that no union shall in future take place under Gilbert's Act, without the previous consent of the commissioners (*n*).

This short historical review of the principles on which the poor law is founded seemed a proper preliminary to the consideration of the present practical system, which may be compendiously explained as follows.

According to the present law, a settlement is acquired by the following methods. 1. By *birth.* For wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement. But if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz. the settlement by parentage, of which we are about to speak next (*o*). 2. By *parentage.* For all legitimate children take the last settlement of the father, and after his death, of the mother; till they are emancipated from parental authority by marriage, or by attaining the age of twenty-one and living permanently separate from the parent, or contracting some relation inconsistent with domestic subjection (*p*); and when emancipated they retain the parental settlement last acquired before that event took place. A bastard child, on the other hand (having in the eye of the law no parent) was formerly held incompetent to claim a derivative settlement. By a provision (*q*), however, in the Poor Law Amendment Act, an illegitimate child born since the act

(*m*) 4 & 5 Will. 4, c. 76, ss. 33, 34.

(*n*) Sect. 37. As to Gilbert's Act, vide sup. p. 165.

(*o*) See R. *v.* Inhabitants of St. Mary, Leicester, 3 Ad. & El. 644; R. *v.* Walthamstow, 6 Ad. & El. 301.

(*p*) See R. *v.* Witton cum Twanbrookes, 3 T. R. 355; R. *v.* Inhabitants of Sowerby, 2 East, 276; R. *v.* Inhabitants of Everton, 1 East, 526; Queen *v.* Inhabitants of Lilleshall, 7 Q. B. 159; Queen *v.* Inhabitants of Scammonden, 8 Q. B. 349.

(*q*) 4 & 5 Will. 4, c. 76, s. 71; vide R. *v.* Walthamstow, ubi sup.; R. *v.* Wendron, 7 A. & E. 819.

passed, is now to follow the settlement of his mother; until he attains the age of sixteen, or gains another for himself (r). But besides those of birth or parentage, there are also settlements acquired by the party's own act. For a female gains a derivative settlement: 3. By *marriage*, i. e. she may claim the settlement which belongs to her husband; and she retains that settlement after his death. If the man has no settlement (being born abroad and having acquired none), or his settlement is unknown, she retains that which belonged to her before marriage. But she cannot in any case acquire one in her own right during the marriage. A settlement may also be acquired, 4. By *renting a tenement* (s), coupled with residence in the same parish for forty days. For this purpose, however, it is requisite that the party should have *bonâ fide* rented a tenement, consisting of a separate or distinct dwelling-house or building or of land (or of both), for the sum of 10*l.* a-year at the least for the term of one whole year; and that he should have occupied the same under such hiring, and actually paid the rent to the amount of 10*l.* for the term of one whole year at the least; and that for the same period he should have been assessed to and paid the poor rate in respect thereof (t). 5. A settlement may also be gained by being *bound apprentice* (u), under indenture or other

(r) See R. v. St. Mary, Newington, 4 Q. B. 581; Bodenham v. St. Andrews, 1 Ell. & Bl. 465; The Queen v. Inhabitants of Sutton Le Brailes, 5 Ell. & Bl. 814; The Queen v. Inhabitants of Combs, ib. 892.

(s) See R. v. Inhabitants of Snape, 6 A. & E. 278; R. v. Inhabitants of Berkswell, 6 A. & E. 282; R. v. Henley-upon-Thames, ibid. 294; R. v. Inhabitants of Hockworthy, 7 A. & E. 492.

(t) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66. See R. v. Inhabitants of Hertsmonceaux, 7 Barn. & Cress. 551; R. v. Parish of Stow, 4 Barn. & Cress. 87; R. v. Inhabitants of Kibworth Harcourt, 7 Barn. & Cress. 790; R. v. Inhabitants of Great and Little Usworth, 5 Ad. & E. 261; Queen v. Benjeworth, 3 Ell. & Bl. 637; R. v. Inhabitants of Halifax, 4 Ell. & Bl. 647.

(u) As to what is a hiring as apprentice, R. v. Inhabitants of Billinghay, 5 A. & E. 676. As to service by apprenticeship, R. v. Inhabitants of Sandhurst, 6 A. & E. 130; R. v. Inhabitants of Closworth, ibid. 286; R. v. Inhabitants of Exminster, ibid.

deed; and inhabiting for forty days under such binding either in the same parish where the service takes place, or a different one. But no settlement can be acquired by being apprenticed in the sea-service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (x); and the deed must in all cases be executed by the apprentice, except in the case of parish apprentices (y). 6. A settlement is gained (of a temporary kind) in any parish by having *an estate of one's own* (z) there, of whatever value, and whether the interest be legal or equitable (a). This particular species of settlement is founded on the principle of the common law, that a man shall not be removed from his own property (b). It is provided, however, that no person shall retain a settlement gained by virtue of any estate or interest in a parish, for any longer time than he shall inhabit within ten miles thereof (c); and in case he shall cease to inhabit within that distance, and shall afterwards become chargeable, he shall be liable to be removed to the parish in which he was settled previously to such inhabitancy, or if he have gained a settlement in some other parish since the inhabitancy, then to such other parish (d). 7. Lastly, a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (e),—excepting those for scavengers and highways, and the duties on houses. But it is provided by the 35

598. As to fraudulent apprenticeship, R. v. Inhabitants of Barmston, 7 A. & E. 858.

(x) 4 & 5 Will. 4, c. 76, s. 67; see R. v. Inhabitants of Maidstone, 5 A. & E. 326; The Queen v. Inhabitants of St. Mary Magdalen, 2 Ell. & Bl. 809.

(y) See R. v. Inhabitants of Arnesby, 3 Barn. & Ald. 584; R. v. Inhabitants of Cromford, 8 East, 25.

(z) As to settlement by estate, R. v. Inhabitants of Ardleigh, 7 A. & E. 70; R. v. Inhabitants of Knaresborough, 20 L. J. (M. C.), 147; Overseers of Wendron v. Overseers of Stythians, 4 Ell. & Bl. 147.

(a) R. v. Inhabitants of Belford, 10 B. & C. 54.

(b) 2 Nolan, 58.

(c) As to the mode of calculating this distance, see Queen v. Inhabitants of Saffron Walden, 9 Q. B. 76.

(d) 4 & 5 Will. 4, c. 76, s. 68; see R. v. Hendon, 2 Q. B. 455.

(e) R. v. Stoke Damerel, 6 A. & E. 308. See 1 & 2 Will. 4, c. 42, s. 5.

Geo. III. c. 101, s. 4, that no person shall gain a settlement on this ground in respect of any tenement or tenements not being of the yearly value of 10*l.*; and by 6 Geo. IV. c. 57, that a settlement shall not be acquired by paying parochial rates for any tenement (not being the person's own property), unless it consists of a separate and distinct dwelling-house or building, or land (or both), *bonâ fide* rented by him for 10*l.* a year at the least for a whole year, and be occupied under such hiring for a year at least. This title to a settlement is therefore nearly merged in that of renting a tenement (*f*).

Such are the modes in which a settlement may now be acquired, and in which it has been capable of being acquired, since the 14th August, 1834, the date of the passing of the Poor Law Amendment Act; by which statute, some material alterations were made in this branch of the law. As questions however may still, for some time to come, arise with respect to settlements gained under the law as it stood immediately before those alterations, it may be desirable to observe, that before the 14th August, 1834, a settlement might be gained by forty days' residence, accompanied with other circumstances of notoriety in addition to those which have been above enumerated, viz. 1. By hiring and service (*g*); which was where a person, being unmarried and childless, was hired for a year, and served a year in the same service. 2. By executing any public annual office or charge within the parish for one whole year. We may also notice that the settlement by renting a tenement was at that period capable of being acquired without payment of the poor rate, or being assessed to the same.

On this part of our subject we shall only add, that when by any of the modes above enumerated a person has gained a settlement in any parish, he is considered as

(*f*) See Arch. P. L. Act, Introduction, p. 3.

(*g*) As to hiring and service, see R. v. Cowpen, 5 Ad. & E. 333; R. v. Rettendon, 6 Ad. & E. 296; R. v. Pilkington, 5 Q. B. 662.

settled there until he acquires a new one in some other place; but the latter acquisition supersedes the earlier (*h*).

All those who in any parish stand in need of relief, and apply for it, are entitled to be relieved there, or, as it is commonly expressed, are *chargeable* to that parish (*i*). If settled there, they constitute its *settled* poor. If not settled there, they are termed its *casual* poor (*k*).

The parish, however, will be immediately exonerated from the burthen, if the pauper has any relation competent, and by law compellable, to maintain him. The relations who are so compellable are the father and grandfather, mother and grandmother, or children of the pauper (*l*). They are liable to maintain him at such rate as shall be assessed by an order of the justices at their general, quarter or petty sessions (*m*): and on refusal to obey such order, the sums so assessed are recoverable (with penalties) by a summary proceeding before two justices of the peace, and may be levied by distress and sale of the goods and chattels of the offender; in default of which he may be committed to

(*h*) As to the effect of a union of two parishes, upon the settled poor of each before such union, see Queen *v.* Inhabitants of St. Martin, New Sarum, 9 Q. B. 241.

(*i*) This is the general principle. But where the parish is comprised in any union, there are cases in which the charge falls not on the individual parish but on the *common fund of the union.* For by 11 & 12 Vict. c. 110, s. 3, (continued by several acts, the last of which is 20 Vict. c. 18,) all the costs of the relief of any poor person not settled in the parish where he resides, but exempted, by 9 & 10 Vict. c. 66 (cited post, p. 177,) from removal, shall, if such parish be comprised within any union, be charged to the common fund of such union.

We may remark here that there are several other instances in which charges under the poor law are incumbent on the common fund of the union,—as in the case of the relief of "a destitute wayfarer or wanderer, or foundling" (11 & 12 Vict. c. 110, ss. 1, 10; 12 & 13 Vict. c. 103, s. 2), or the procurement of burial grounds for paupers in the workhouse (13 & 14 Vict. c. 101, s. 2), or the annual subscription to hospitals (14 & 15 Vict. c. 105, s. 4).

(*k*) See 33 Geo. 3, c. 35, s. 3; R. *v.* St. Pancras, 7 A. & E. 750; and see 7 & 8 Vict. c. 101, s. 26, as to the relief of wives whose husbands are beyond sea or confined as lunatic or idiot; and the relief, (in certain cases,) of widows.

(*l*) 43 Eliz. c. 2, s. 7.

(*m*) 59 Geo. 3, c. 12, s. 26.

prison (n). To secure the performance of this duty it is moreover provided by 5 Geo. I. c. 8, that where persons run away from their place of abode, leaving their wives or children chargeable to a parish,—their goods, or the annual profits of their lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the discharge of the parish, and the maintenance of the wife and children. It is also enacted by 5 Geo. IV. c. 83, that persons able wholly or in part to maintain themselves or families by work or other means, and refusing or neglecting to do so, whereby they become chargeable to a parish, shall be deemed *idle and disorderly persons;* and may be punished by a single justice, on oath of one witness, by imprisonment in the house of correction with hard labour, for any time not exceeding one calendar month. And by the same statute, the desertion of a family is still more severely penal: for persons running away and leaving their wives or children chargeable are deemed *rogues and vagabonds;* and incur by the same act the like imprisonment for any time not exceeding three calendar months (o).

If there are no relations to whom recourse can be had, the settled poor are then to be relieved by the parish, so long as their necessity continues; but if paupers who are able to work refuse to do so, they may be committed to the common gaol or house of correction (p).

With respect to the casual poor, they may in general be *removed* in the manner to be presently described; and they

(n) 4 & 5 Will. 4, c. 76, ss. 78, 99; 11 & 12 Vict. c. 110, s. 8. By sections 56 & 57 of the former statute, relief given to a child under sixteen (not blind or deaf and dumb) shall be considered as given to the parent; and every person is to maintain his wife's children before marriage until sixteen or the death of the mother. Vide sup. vol. II. p. 296.

(o) As to the expense of prosecutions in offences of this nature, see 7 & 8 Vict. c. 101, s. 69. By 12 & 13 Vict. c. 103, s. 3, the chargeability to the common fund of a union shall have the same effect, so far as regards such offences, as chargeability to a parish.

(p) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137; 7 & 8 Vict. c. 101, ss. 57, 58.

are entitled to relief only till such removal can be effected. All such as were born in Scotland or Ireland, the Isle of Man, Scilly, Jersey or Guernsey, and not settled in England,—may, upon complaint of any guardian, relieving officer or overseer, be removed at the expense of the union or parish (q) to the place of their birth, with their families, (that is, with their wives and children, or such of them as are chargeable and have yet acquired no settlement in their own right (r),) by virtue of a warrant under the hands and seals of two justices of the peace (s). Those who have a known place of settlement in England (wherever born) may also be removed to it with their families under an *order* (or *warrant*) *of removal* (t). This order is to be obtained from two justices of the peace, upon complaint of the churchwardens or overseers of the parish to which they have become chargeable (u). It is usually founded on

(q) The expenses in the case of a parish not in union, and not containing more than 30,000 persons, are payable out of the county rate. 8 & 9 Vict. c. 117, s. 5.

(r) See Much Hoole *v.* Preston, 17 Q. B. 548; The Queen *v.* St. Giles without Cripplegate, ib. 636; The Queen *v.* St. Anne, Blackfriars, 2 Ell. & Bl. 440; The Queen *v.* Inhabitants of Llansaintfrid, ib. 803.

(s) 17 Geo. 2, c. 5; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 8 & 9 Vict. c. 117 (repealing 11 Geo. 4 & 1 Will. 4, c. 5; 3 & 4 Will. 4, c. 40; 7 Will. 4 & 1 Vict. c. 10; 3 & 4 Vict. c. 27; 7 & 8 Vict. c. 42). And see the following cases under the old law; R. *v.* Whitehaven, 5 B. & Ald. 720; R. *v.* Great Clacton, 3 B. & Ald. 410; R. *v.* Leeds, 4 B. & Ald. 498; R. *v.* Heaton Norris, 7 B. & C. 619; R. *v.* Benett, 2 B. & Adol. 712; R. *v.* Preston, 11 Ad. & E. 822. By 8 & 9 Vict. c. 117, s. 4, the justices of the peace of every country are directed to make regulations for carrying out the provisions of that act, and particularly (as respects Irish and Scotch paupers) to provide that, as far as may be, they shall be landed at that port, among those mentioned in the schedule to the act, which is nearest to their native place. See 18 & 19 Vict. c. 91, s. 22, charging the East India Company with the care of destitute Lascars in this country.

(t) As to the procedure in respect of orders of removal, see 11 & 12 Vict. c. 31. As to the delivery of the pauper thereunder, 9 & 10 Vict. c. 66, s. 7; 14 & 15 Vict. c. 105, s. 13. As to unlawfully procuring a removal, 9 & 10 Vict. c. 66, s. 6; 12 & 13 Vict. c. 103, s. 3. See the more modern cases relating to orders of removal and appeals thereupon collected in 12 Q. B. pp. 1—216.

(u) 13 & 14 Car. 2, c. 12, s. 1. Dickenson's Quarter Sessions, by Talfourd, p. 711. By 7 & 8 Vict. c. 101, s. 69, and 11 & 12 Vict. c. 110, s. 11, the certificate of the

an examination of the pauper as to the place of his last settlement; and notice in writing of such order, accompanied by a statement in writing of the ground of the removal, must be sent, by the guardians or overseers, to the overseers of the parish to whom it is directed (*x*). If that parish submits to the order, or does not give notice of appeal from it within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, he shall be kept in the original parish until the same (if duly prosecuted) shall be determined (*y*). The appeal is to the quarter sessions for the county, division, or riding, where the parish is situated from which the removal is directed to take place. If that court think fit, it may order the parish against which the appeal shall be decided to pay costs to the other, to such amount as the court shall certify, and as may appear just and reasonable (*z*); and where the respondents succeed, they are entitled to the costs of the relief and maintenance of the pauper from the time they gave the notice of the order of removal (*a*). In the event of some point of law arising upon which the justices feel themselves unable to decide, they have the power of making their order or decision in the appeal, subject to a *special case;* that is, to connect it with a statement of the facts proved before them, that the opinion of the Court of Queen's Bench may be taken upon the point of law (*b*). The latter court then issues a writ of *certiorari* (*c*), to remove the proceedings to its own juris-

board of guardians as to the chargeability of a pauper shall be sufficient evidence thereof.

(*x*) 4 & 5 Will. 4, c. 76, s. 79; 11 & 12 Vict. c. 31, ss. 2, 3, 4.

(*y*) 4 & 5 Will. 4. c. 76, ss. 79, 80, 81, 83; R. *v.* Kent (Justices), 6 B. & C. 639.

(*z*) 4 & 5 Will. 4, c. 76, s. 82; 12 & 13 Vict. c. 45, ss. 4, 5.

(*a*) 4 & 5 Will. 4, c. 76, s. 84.

(*b*) A *special case* may now be stated, by consent of parties and order of a judge of the superior court, immediately after notice of appeal, and without any resort to the court of quarter sessions, 12 & 13 Vict. c. 45, s. 11. The matter may also be referred to *arbitration*, ibid. ss. 12—15.

(*c*) As to the cases in which the decision of the court of quarter sessions is final, and not subject to be reviewed on certiorari, see 12 & 13

diction, which, being delivered to the clerk of the peace for the county, is returned by him together with the order of sessions and the special case. The matter of law is then argued before the Court of Queen's Bench, which delivers its opinion, and affirms or quashes the order, as it may be found to be correct or otherwise. If there is no known place of settlement in England, and if the pauper was not born in any part of the united kingdom to which he can be removed from England, under the provisions in that behalf before mentioned, then (as the law authorizes no removal except in the cases thus specially provided for), he must remain of necessity in the parish where he is chargeable, and he may claim relief there so long as he continues to be in want, upon the same footing with its settled poor, unless some place of settlement be afterwards discovered.

There are also some particular cases in which the removal even of a pauper settled in England, or born in such part of the united kingdom as above referred to, is illegal. For the wife of a person without a settlement cannot be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*d*); nor can a child be taken away from its mother during its nurture (that is, until the age of seven years), whether it be legitimate or a bastard (*e*). So if the pauper is unable to travel by reason of sickness or infirmity, or cannot travel without danger, the justices making the order or warrant are required to suspend the execution of the same, until they are satisfied that it may be safely executed (*f*); and it is provided that such suspension shall extend to any other of the pauper's family who shall be mentioned in such

Vict. c. 45, s. 9. As to amendment after certiorari, ibid. s. 7.. As to the practice on certiorari, R. v. Abergele, 5 Ad. & E. 795.

(*d*) See R. v. Eltham, 5 East, 113; R. v. St. Mary, Beverley, 1 B. & Ad. 201.

(*e*) Cald. 6; R. v. Birmingham, 5 Q. B. 210.

(*f*) 35 Geo. 3, c. 101, s. 2; 49 Geo. 3, c. 124.

order or warrant (*g*). With respect also to persons who are in custody for felony, misdemeanor, debt, or lunacy, it is to be observed they cannot be removed under the poor laws, from the parish where they happen to be confined (*h*). And by a late statute (9 & 10 Vict. c. 66, amended by 11 & 12 Vict. c. 111), introducing great alterations of the law on the subject of removal, it is provided that no person can be removed from a parish in which he has resided for five years next before the application for a warrant for his removal (*i*); nor for becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state therein that they are satisfied that the sickness or accident will produce permanent disability; nor (being a woman residing with her husband at the time of his death), till twelve calendar months after his death (*k*), if she shall so long continue a widow. And it is further enacted, that no child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed in any case where such his parent or reputed parent, stepfather, or stepmother, may not lawfully be removed; but that no person exempted by

(*g*) 49 Geo. 3, c. 124.

(*h*) As to the relief of persons in prison, vide 19 Car. 2, c. 4; 23 Geo. 3, c. 23, s. 2; 52 Geo. 3, c. 160; 58 Geo. 3, c. 113; 9 Geo. 4, c. 40; R. *v.* Overseers of Holbeck, 20 L. J. (M. C.), 107.

(*i*) See R. *v.* Harrow-on-the-Hill, 12 Jur. 518. It is to be observed that time passed in prison or in military or naval service under her Majesty, (see Hartfield *v.* Rotherfield, 17 Q. B. 746; Queen *v.* Inhabitants of East Stonehouse, 4 Ell. & Bl. 901;) or as an in-pensioner in Greenwich or Chelsea hospitals; or in confinement in lunatic asylums; or as a patient in a hospital; or during which relief (except bonâ fide charitable gifts) from any parish shall be received;—is to be excluded from the computation of the five years. As to interruption of the residence, see also 12 & 13 Vict. c. 103, s. 4, and the following among other recent cases:—The Queen *v.* Stapleton, 1 Ell. & Bl. 766; The Queen *v.* Bennett, 3 Ell. & Bl. 341; The Queen *v.* Directors of the Brighton Poor, 4 Ell. & Bl. 236.

(*k*) See as to this, Queen *v.* Inhabitants of St. Marylebone, 20 L. J. (M. C.), 178.

this Act, from liability to removal, shall, by reason of such exemption, acquire any settlement in any parish.

The duty of *relief*, where the parish is under the government of guardians or a select vestry, belongs to those authorities, according to the provisions of the acts under which they have been respectively appointed, and subject to the rules of the poor law board (*l*). Where there are no such authorities it belongs (subject to the same rules) to the overseers; or, where there is a local act of parliament on the subject, to the authorities by such act established (*m*).

In all cases, however, of *sudden and urgent necessity* arising in a parish under the government of guardians or a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give such temporary relief as the case may require; which he is directed to do in articles of absolute necessity, but not in money: and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may direct it to be given by an order under his hand or seal; and the overseer disobeying such order incurs a penalty of not exceeding 5*l*. (*n*). Whatever be the settlement or residence of the pauper, any justice of the peace is also empowered, in a parish similarly circumstanced, to order *medical* relief in all cases

(*l*) As to the *expense* of the relief, as between the individual parish and the union, of which it forms a component part, vide sup. p. 174. By 11 & 12 Vict. c. 110, any question as to the expense of relief between any parishes in a union, or between the guardians and any of the parishes therein, may be submitted by the parties to the poor law board.

(*m*) Where there is a local act, the poor law board has nevertheless a power of regulation and superintendence; but cannot abolish the local board; Ninth Annual Report of Poor Law Commissioners, 1843, pp. 18, 19. See The Queen *v.* Poor Law Commissioners, In re St. Giles and St. George, 17 Q. B. 445; Queen *v.* Robinson, ibid. 466; Queen *v.* Governors of Poor of St. James, Westminster, ibid. 474. For provisions as to parishes under local acts, see also 7 & 8 Vict. c. 101, ss. 64, 65; 11 & 12 Vict. c. 91, s. 12. As to extra-parochial places, see 20 Vict. c. 19.

(*n*) 4 & 5 Will. 4, c. 76, s. 54.

of sudden and dangerous illness: the overseer being subject to the same penalty as in the former case of disobedience (*o*). And in unions formed under the Poor Law Amendment Act any two justices of the peace usually acting for the district, may, at their discretion, order any adult person, who is entitled to relief, and unable to work, to be relieved, if he desires it, without residing in the workhouse (*p*). It is provided however that one of the justices shall certify in such order, of his own knowledge, that the person is unable to work.

These powers of overseers and magistrates to afford relief in particular cases, apply (it will be observed) only to parishes under the management of guardians or a select vestry (*q*). In parishes not so circumstanced, their authority in this matter is not specific but general. The duty of administering relief belongs universally and (in the first instance) exclusively, to the overseer. But if he refuses it in any case in which it is reasonably claimed, it may be granted by order of any justice of the peace residing in the parish, or (if there be none resident) in the parish next adjoining, or by order of the justices in their respective quarter sessions; and if the overseer disobeys such order he may be indicted (*r*).

The duty of making and levying (*s*) the poor-rate, or parochial fund, out of which the relief is to be afforded, still belongs (as before the late change in the law of relief) to the churchwardens and overseers; and the concurrence of the inhabitants is not necessary (*t*). But for the better execution of these duties, the recent acts relating to the amendment of the poor law authorize the appointment of

(*o*) 4 & 5 Will. 4, c. 76, s. 54.

(*p*) Ibid. s. 27. As to out-door relief, see 11 & 12 Vict. c. 91, s. 12. As to the power of guardians to enable a poor person relieved out of the workhouse, to provide education for his child, vide post, p. 213.

(*q*) 4 & 5 Will. 4, c. 76, s. 54.

(*r*) 3 W. & M. c. 11, s. 11; 9 Geo. 1, c. 7, s. 1.

(*s*) As to the distress for poor rate, 43 Eliz. c. 2, ss. 12, 13; 12 & 13 Vict. c. 14.

(*t*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict. c. 101, s. 63.

collectors and assistant overseers (u). The rate is raised prospectively (x) for some given portion of the year, and upon a scale adapted to the probable exigencies of the parish (y); and the act of Elizabeth directs that it should be raised by "taxation of every inhabitant, parson, vicar, "and other, and of every occupier of lands, houses, tithes "impropriate, propriations of tithes, coal mines, or sale-"able underwoods" in the parish (z). As an *occupier* (a) a man is rateable for all lands (b) which he occupies in the parish, whether he is resident or not (c); but the tenant

(u) See 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62. As to the appointment, &c. of overseers and assistant overseers, see R. v. Watts, 7 A. & E. 461; The Queen v. Greene, 17 Q. B. 793; Worth v. Newton, 10 Exch. 247. As to collectors of poor's rate and their remuneration, see Smart v. The Guardians of the Poor of the West Ham Union, 11 Exch. 867.

(x) As to the objection that the rate is retrospective, see R. v. Gloucester, 5 T. R. 346; 1 Nolan, 62.

(y) 1 Nolan, 61, 62.

(z) As to the exemption of *scientific and literary societies*, see 6 & 7 Vict. c. 36; R. v. Pocock, 15 L. J. 132 (M. C.); R. v. Jones, ibid. 129; Russell Institution v. Vestry of St. Giles, 3 Ell. & Bl. 416; Churchwardens of St. Anne v. Linnean Society, ibid. 793; Marylebone Vestry v. Zoological Society, ibid. 807; Purchase v. Churchwardens of the Holy Sepulchre, 4 Ell. & Bl. 156. As to the exemption of *public* property, Reg. v. Shee, 4 Q. B. 2; De la Beche v. Vestrymen of St. James, 4 Ell. & Bl. 385; and of *crown* property, Netherton v. Ward, 3 B. & A. 21; Tracey v. Taylor, 3 Q. B. 966. As to the rateability of premises used for *charitable purposes*, R. v. Waldo, Cald. 358; R. v. Skerry, 12 A. & E. 84; R. v. Wilson, ibid. 94; R. v. Badcock, 6 Q. B. 787; R. v. St. George-the-Martyr, 16 L. J. (M. C.), 129.

(a) As to occupier as *servant*, R. v. Wall Lynn, 8 A. & E. 379; S. C. 1 W. W. & H. 366. And see R. v. Ponsonby, 3 Q. B. 14.

(b) As to rateability of *tithes*, R. v. Joddrell, 1 B. & Ad. 403; R. v. Barker, 6 A. & E. 388. As to the rateability of *corporations*, R. v. Mayor of York, 6 A. & E. 419. As to the rateability of a *gas company*, R. v. Birmingham and Staffordshire Gas Company, ibid. 634; R. v. Commissioners for lighting Beverley, ibid. 645. As to the rateability of *machinery*, Reg. v. Guest, 7 A. & E. 951. As to the rateability of *municipal* corporations, 4 & 5 Vict. c. 48. As to the rateability of a *box at a theatre*, Reg. v. St. Martin in the Fields, 3 Q. B. 204. As to the principle on which *railway companies* are rated, see The Queen v. Brighton Railway, 15 Q. B. 313; South Eastern Railway Company, app. v. Overseers of Dorking, resp., 3 Ell. & Bl. 491. As to *treasurer of a county court*, see the Queen v. Overseers of Manchester, 3 Ell. & Bl. 336.

(c) 1 Bott, 112.

(and not the landlord) is considered as the occupier within this statute (*d*). As an *inhabitant* (*e*) a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the local and visible personal property he had within the parish, and of which he made profit (*f*); but by 3 & 4 Vict. c. 89 and 19 & 20 Vict. c. 42, the liability to taxation in regard to inhabitancy is now taken away until October, 1859 (*g*).

By 6 & 7 Will. IV. c. 96 (*h*) it is provided, that, after such period as the Poor law board shall direct, no poor rate shall be of any force which shall not be made on an estimate of the net annual value of the several hereditaments rated,—that is to say, the rent at which the same may reasonably be expected to be let from year to year, free of all usual tenant rates and taxes, and tithes commutation rent charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any), necessary to maintain them in a state to command such rent. The act also prescribes in what form the rate shall be made (*i*), and what particulars it shall comprise; and requires that the parish officers shall sign a declaration at the foot of it, to the effect that these particulars are true and correct as far as they have been able to ascertain by their best endeavours. The Poor law board is also empowered by this act to order a new valuation

(*d*) R. *v.* Welbank, 4 M. & S. 222. The vestry, however, of any parish may order that the *owners* of tenements in such parish, the yearly rateable value whereof shall not exceed 6*l.* shall be rated in lieu of the occupier, 13 & 14 Vict. c. 99. But this will not affect the occupier's right of voting at elections, 14 & 15 Vict. c. 39.

(*e*) As to the competency of rated inhabitants to give evidence, 3 & 4 Vict. c. 26; Doe *d.* Boultbee *v.* Adderley, and Doe *d.* Batchelor *v.* Bowles, 8 A. & E. 502; S. C. 1 P. & D. 469.

(*f*) R. *v.* Lumsdaine, 1 W. W. & H. 587.

(*g*) As to the former practice of rating *stock in trade*, see Report on Local Taxation, pp. 21, 35.

(*h*) As to this act, (the Parochial Assessment Act) see Report on Local Taxation, pp. 28, 48.

(*i*) See the Queen *v.* Eastern Counties Railway Company, 5 Ell. & Bl. 974.

to be made in any parish or union, upon representation, in writing, from the board of guardians under their common seal, or from the majority of the parish officers (*k*).

By 43 Eliz. c. 2, s. 1, no rate can be deemed valid unless it be allowed by two justices; and by 17 Geo. II. c. 3, public notice thereof is to be given at the parish church on the Sunday next after the same has been allowed (*l*). The allowance by the justices is a mere matter of form (*m*); but after allowance and publication, any person aggrieved by the rate, and having reasonable objection to it, as irregular and unequal, may appeal against it to the next practicable quarter sessions of the county, riding or division (or, in some cases, of the corporation or franchise,) in which the parish is situate.

But so far as regards objections on the ground of irregularity, unfairness, or incorrectness of valuation, appeals may now also be preferred to another jurisdiction at the option of the party aggrieved; for by 6 & 7 Will. IV. c. 96, the justices in petty sessions shall, four times at least in every year, hold a special sessions for hearing appeals on any ground of that description within their respective divisions (*n*); and their decisions shall be conclusive, unless the parties impugning it shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. In either course of proceeding the justices have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new one (*o*). They have also authority to award costs to the successful party (*p*); and the court of quarter sessions may make its decision

(*k*) Vide as to the appeal under this act, R. *v.* St. Alban's, 1 W. W. & H. 680.

(*l*) As to the manner of giving notice see 1 Vict. c. 45; Ormerod *v.* Chadwick, 16 Mee. & W. 367.

(*m*) R. *v.* Dorchester (Justices), 1 Str. 393.

(*n*) 6 & 7 Will. 4, c. 96, s. 6. As to an appeal against the rate, R. *v.* George, 6 A. & E. 305; R. *v.* Bond, ibid. 905; R. *v.* Justices of Cambridgeshire, 1 L. M. & P. 47; Queen *v.* Trafford, 15 Q. B. 200.

(*o*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*p*) Ibid.

(as in the case of an order of removal), subject to a special case.

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to render to the proper (q) auditors,—or, if there be none, to the guardians, or (where there are no such officers) to the justices in petty sessions,—once in every half year, (and oftener if required by the rules of the poor law board,) an account of all monies and things received and expended; and to verify the same on oath if required (r): and all balances remaining from time to time in their hands may be recovered from them by a summary proceeding before two justices of the peace (s). Overseers are also bound to render an account at the end of their year of office (t).

These are the general heads of the law relating to the poor (u); many branches of which are of too recent intro-

(q) See 4 & 5 Will. 4, c. 76; 7 & 8 Vict. c. 101, s. 32, and 11 & 12 Vict. c. 91.

(r) Any parish officer supplying for his own profit goods given in parochial relief, incurs a penalty of 5*l.* (4 & 5 Will. 4, c. 76, s. 77; vide Henderson *v.* Sherbourne, 2 Mee. & W. 236.) As to sale of parish property, see 5 & 6 Vict. c. 18; Report of Poor Law Commissioners for 1843, p. 29.

(s) 4 & 5 Will. 4, c. 76, ss. 47, 99; 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 32—38. See also Sir John Hobhouse's Act, 1 & 2 Will. 4, c. 60; R. *v.* St. Marylebone, 5 Ad. & El. 268.

(t) 4 & 5 Will. 4, c. 76, s. 47; vide R. *v.* Johnson, 5 Ad. & El. 340. There are several other rates which in practice are levied parochially upon the same assessment, and by the same officers, as the poor's rate; as to which, see Report on Local Taxation, p. 62; and by 7 & 8 Vict. c. 33, the county rate, and all other like rates, are now to be raised through the agency of the guardians and overseers of the poor, and without the intervention (which the law formerly required) of the high constable. See further as to the collection of the borough and watch rates, 8 & 9 Vict. c. 110; and of the county rate, 15 & 16 Vict. c. 81.

(u) It has been felt necessary to condense, as far as possible, the account given of this complex subject. No mention has therefore been made in the text of provisions recently introduced, which, though of considerable interest and importance, did not appear to require notice in so general an exposition of the poor law. For example, those which have been passed for the combination of unions and parishes, (as regards certain

duction to have been yet fairly subjected to the test of experience. The great object, however, of the whole system is to give such relief as charity requires to the impotent poor, or those unable to find employment, without affording encouragement to the idle; and its operation can never be considered as safe or satisfactory, except so far as it tends to promote that combined result. For while humanity and religion prescribe the succour of the destitute, nothing is more obviously unreasonable than to compel the industrious part of the community to maintain those who are unwilling to labour; and surely they must be very deficient in foresight as well as in justice, [who suffer one half of a parish to continue dissolute and unemployed, and at length are amazed to find that the industry of the other half is not able to maintain the whole.]

places,) into districts for *asylums for the temporary accommodation of the houseless poor*. See 7 & 8 Vict. c. 101, ss. 40—54; 14 & 15 Vict. c. 105, s. 14. For the same reason, the provisions as to the *burial*, and as to *emigration* of paupers, have been omitted. For the former, see 7 & 8 Vict. c. 101, s. 31; 18 & 19 Vict. c. 79, c. 105, ss. 11—13. As to the latter, 4 & 5 Will. 4, c. 76, s. 62; 7 & 8 Vict. c. 101, s. 29; 11 & 12 Vict. c. 110, s. 5; 12 & 13 Vict. c. 103, s. 20; 13 & 14 Vict. c. 101, s. 4; 18 & 19 Vict. c. 119, s. 6. Among the provisions omitted may also be mentioned those of 5 & 6 Will. 4, c. 69, and 20 & 21 Vict. c. 13, enabling ecclesiastical corporations sole to dispose of land by way of sale or exchange to be used as the *site of a workhouse*, or for any purpose relating to the relief of the poor, which the Poor Law Board may approve.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES AND BENEVOLENT INSTITUTIONS.



1. Charities.—From the subject of the maintenance provided by law for the poor, we may pass, by no abrupt transition, to that of public charities.

Charities have been always much favoured by the law (*a*). Thus, though gifts to *superstitious* uses were made void by a statute passed at the period of the Reformation (*b*), a distinction was allowed in favour of those for charitable purposes; which were held not to fall within the operation of that statute. For "no time," as Lord Coke observes, "was so barbarous as to abolish learning, or so uncha-"ritable as to prohibit relieving the poor" (*c*). By the statute 39 Eliz. c. 5, (made perpetual by 21 Jac. I. c. 1,) any person is enabled by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, to hold to them and their successors, without the king's licence (which by the statutes of mortmain is in general required where land is conveyed to a body corporate); subject only to these conditions, that the lands be freehold, in fee simple, of the clear value of 10*l.* and not exceeding that of 200*l.* per annum.

The same disposition to favour and encourage charities has been evinced in other instances. Thus, by the Statute of Charitable Uses, 43 Eliz. c. 4, the lord chancellor is

(*a*) Bac. Ab. Ch. Uses, E.

(*b*) 23 Hen. 8, c. 10. See also 15 Rich. 2, c. 5; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14.

(*c*) Porter's case, 1 Rep. 26.

empowered to award commissions to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the fund; though the universities and cathedrals, and all colleges, hospitals, and free-schools, having special visitors or governors, are excepted from this provision (*d*).

And whereas the statutes of mortmain prohibit in general the endowment of collegiate or corporate bodies with land, without the king's licence; and some doubts arose at the time of the Revolution, as to the right of the crown to exercise this dispensing power (*e*); therefore, by a statute passed at that period (7 & 8 Will. III. c. 37), after reciting that it would be a great hindrance to learning and other good and charitable works, if persons inclined to grant lands to bodies incorporated for good and public uses should not be permitted to do so,—it was enacted (in confirmation and extension of the prerogative antecedently vested in the crown in this particular), that the king may grant to any persons whatever, licence to alien, purchase or hold, in mortmain (*f*).

So far the interposition of the legislature had been uniformly favourable to charities. Some abuses, however, were afterwards found or supposed to attend the power of devising lands by will, or making them over at the approach of death, for purposes of this description; and by 9 Geo. II. c. 36, after reciting that many large and improvident alienations of land had of late been made by dying persons to charitable uses, it was enacted that no lands or tenements, or money to be laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for the benefit of any such uses; unless by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the grantor, and enrolled, within six calendar months after its execution, in the High Court of Chancery. This provision, with the exceptions to which

(*d*) See Collison's case, Hob. 136.

(*e*) See Hovenden's Blackst. vol. ii. p. 252.

(*f*) Vide sup. vol. I. p. 453.

it is subject, we had occasion to consider in a former volume (*g*); and it will therefore be unnecessary to dwell upon it farther in this place. We shall only remark, that it has no reference to dispositions of mere personal estate, when not directed to be laid out in land; and that such dispositions, whether by will or otherwise, may consequently be made, without restraint, to uses of a charitable description.

The law has also subjected charitable endowments to some check, in the particular case of a lying-in hospital; for by 13 Geo. III. c. 82, after reciting that such hospitals merited support and encouragement, it is nevertheless enacted that no establishment of the kind shall be set on foot without a previous licence from the quarter sessions; and regulations are made to prevent illegitimate children, born within such hospitals, from being chargeable to the parish of their births.

When a charitable commission issues under the 43 Eliz. c. 4 (*h*), the decree of the commissioners is returned into the Petty Bag Office of the Court of Chancery; and it may be contested on the equity side of that court (*i*). The proceedings for that purpose are treated as an original suit, in which the parties are not bound by the evidence before the commissioners, but may allege what new matter they please (*k*). Upon these allegations they go to proof, and examine witnesses upon all the matters in issue; and the court may decree the respondent to pay all the costs, though no such authority is given by the statute; and, as the proceeding is throughout considered as an original cause, an appeal lies of course from the chancellor's decree, notwithstanding any loose opinions to the contrary (*l*).

Commissions, however, under the statute of Elizabeth have been long disused, their place being supplied by remedies of a more simple and effective kind. For inde-

(*g*) Vide sup. vol. I. p. 460.

(*h*) Vide sup. p. 188.

(*i*) See as to the Petty Bag Office and the Court of Chancery, post, bk. v. c. iv.

(*k*) 1 Bac. Ab. Ch. Uses, F.; 3 Bl. Com. 436.

(*l*) Ibid.; 2 Vern. 118.

pendently of this statute, [the king, as *parens patriæ*, has the general superintendence of all charities] not otherwise sufficiently protected (*m*); [which he exercises by the keeper of his conscience, the chancellor. And, therefore, whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the *relator*) files *ex officio* an information in the Court of Chancery, to have the charity properly established (*n*);] and it is not essential that the relators should be the persons principally interested; for any persons (though the most remote of them who fall within the contemplation of the charity) may stand in that capacity (*o*).

By statute 52 Geo. III. c. 101, it is besides provided, that in every case of the breach of a trust created for charitable purposes, or wherever the direction of a court of equity shall be deemed necessary for the administration of such a trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by petition to the lord chancellor, or master of the rolls, or keeper of the great seal (*p*). The petition is to be heard in a summary way, and the order which the court may make is to be final and conclusive, unless within two years afterwards there shall be an appeal to the House of Lords.

By a statute passed in the same year (52 Geo. III. c. 102) provision was also made for the registering and securing of charitable donations, in order to prevent their benefits from being lost. A memorial of the funds and objects of the then existing charities, and the names of the founders (when known), and of the persons having custody of the deeds of endowments, and of the trustees or possessors of

(*m*) 3 Bl. Com. 427. As to this qualification of Blackstone's doctrine, see Shelford on Charities, Uses and Trusts, p. 268.

(*n*) 3 Bl. Com. 428; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 118; Attorney-General *v.* Middleton, 2 Ves. sen. 329; Same *v.* Brereton, ibid. 426.

(*o*) Attorney-General *v.* Bucknall, 2 Atk. 328.

(*p*) The act adds, "or to the Court of Exchequer," but the equity side of the Court of Exchequer is now abolished by 5 Vict. c. 5.

the estates, is directed to be registered by such trustees or possessors, within six months from the passing of the Act, in the office of the clerk of the peace of the county or town; and a duplicate to be transmitted to the Court of Chancery. So, with respect to future charities, created by any deed or instrument, a like memorial is required, within twelve months after the decease of the donor: but donations neither secured on land nor permanently invested in the funds, or the management of which is left to the discretion of trustees, are (with many other particular cases) excepted from the provisions of the Act.

By recent enactments, however, a more complete protection has now been thrown over the charitable endowment of the country (*r*). By 16 & 17 Vict. c. 137, called "The Charitable Trusts Act, 1853," (amended by 18 & 19 Vict. c. 124, called "The Charitable Trusts Amendment Act, 1855," and by 20 & 21 Vict. c. 76,) it is provided,

(*r*) We pass over here a variety of preceding efforts of the legislature in the same direction. The 58 Geo. 3, c. 91, and 59 Geo. 3, cc. 81, 91, authorized the appointment of commissioners, to inquire into endowed charities and to certify to the Attorney-General such cases as they found to require the interposition of a court of equity. The powers of these commissioners and their successors were enlarged and continued by 5 Geo. 4, c. 58; 10 Geo. 4, c. 57; 1 & 2 Will. 4, c. 34; 2 Will. 4, c. 57; 7 Will. 4 & 1 Vict. c. 4; and did not terminate until 1st July, 1837 (see sect. 8 of the act last mentioned). Their reports were numerous, and were printed by order of the House of Commons. The following statutes may also be noticed in this place:— 1 & 2 Geo. 4, c. 92, empowering trustees of charity lands in certain cases to exchange them for others; 3 Geo. 4, c. 72, s. 11, authorizing the apportionment of the charitable endowments of a parish, where it has been divided under the Church Building Acts; 1 & 2 Will. 4, c. 60, s. 39, directing lists of the charitable endowments of the parish to be made by the vestries adopting that act; 2 Will. 4, c. 57, s. 3, making provision for the supply of new trustees, where the original trustees of a charity are dead and the representative of the last survivor is not to be found; 4 & 5 Will. 4, c. 76, s. 74, empowering the Poor Law Board to require, from persons holding property in trust for the poor, a true account in writing of the particulars; 13 & 14 Vict. c. 60, s. 45, giving facilities as to the vesting of lands, &c., by order of the Court of Chancery, in charity trustees; 14 & 15 Vict. c. 56, facilitating the service of notices on the governors and members of charitable institutions.

that her Majesty may appoint Commissioners, to be styled "The Charity Commissioners for England and Wales," who shall have power to examine into all charities, and to prosecute such inquiries by certain of their officers called Inspectors;—to require trustees and other persons to render to the Board of Commissioners written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property;—to authorize suits and proceedings concerning the same;—to sanction building leases, repairs or improvements, or the sale or exchange of the charity lands;—and to authorize a great variety of other acts to be done in relation to them, such as the varying circumstances of each case may from time to time require. The Acts also appoint corporate bodies, by the names of "The Official Trustees of Charity Lands," and "The Official Trustees of Charitable Funds," in whom respectively the land, stock, securities and money of charities may, under such circumstances as pointed out in the Acts, from time to time become vested by order of any court having jurisdiction (*s*); and the Board may order these corporations respectively, to convey the land, or to assign and pay over the stock, securities and money as it shall think expedient (*t*). And the Acts further provide, that where the appointment or removal of any trustee, or any other relief, order or direction relating to any charity, shall be considered desirable, it shall be lawful, if the gross annual income exceeds 30*l*. (*u*), for any person authorized by the Board, (or for the attorney-general,) to make application without information, bill or petition, to the Master of the Rolls or one of the Vice-Chancellors (*x*) sitting at chambers, for such order as the case may require: and, if they think proper to adjudicate upon the matter, their order shall not be subject to appeal

(*s*) 16 & 17 Vict. c. 137, ss. 48, 53; 18 & 19 Vict. c. 124, s. 15, &c.

(*t*) 18 & 19 Vict. c. 124, s. 37.

(*u*) Or with respect to any charity established within the city of London, whether it does, or does not, exceed 30*l*. (16 & 17 Vict. c. 137, s. 30.)

(*x*) In the county palatine of Lancaster the chancellor and vice-chancellor of the county palatine have also this jurisdiction. (Sect. 29.)

in any case where the gross annual income is not more than 100*l.* (*y*). On the other hand, if the gross annual income does *not* exceed 30*l.*, it shall be lawful for any person authorized by the Board, (or for the attorney-general,) to make application to a district court of bankruptcy, or to a county court, within the district of which respectively the charity is established; and such court shall entertain the application and hear the matter in open court, and make order as the case may require (*z*); though in certain cases such order shall not be effectual until confirmed by the Board (*a*). A great number of cases, however, are exempted from the operation of these Acts (*b*); and among others it is provided, that they shall not extend to the universities of Oxford, Cambridge, London, or Durham; or any college or hall in those universities; or any cathedral or collegiate church (*c*); or the colleges of Eton and Winchester (*d*);—though any exempted charities may petition the Board to have the benefit of the acts allowed to them; and any charities whatever may refer any question or dispute arising among their members, in relation to the management, to the arbitration of the board (*e*).

Some account having been now given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to this subject.

The courts of equity, (for to these the jurisdiction in general belongs,) take cognizance of all charitable uses or trusts of a public description; and exercise, in relation to them, powers of a very extensive kind. Under the authority of these tribunals, trustees may be called to account for the charitable funds committed to their charge, or new trustees, (where circumstances so require,) may be appointed,

(*y*) 16 & 17 Vict. c. 137, s. 28.

(*z*) Ibid. s. 32.

(*a*) Ibid. s. 37.

(*b*) Charities or institutions exclusively for the benefit and under the superintendence of Roman Catholics are exempted from the Acts, till 1st Sept. 1858. (20 & 21 Vict. c. 76.)

(*c*) 16 & 17 Vict. c. 137, s. 62.

(*d*) 18 & 19 Vict. c. 124, s. 47—49.

(*e*) 16 & 17 Vict. c. 137, ss. 63, 64; 18 & 19 Vict. c. 124, s. 46.

—improvident alienations of the charitable estates may be rescinded,—schemes for carrying properly into effect the intention of the donor, (where the nature of the case requires such interference,) may be judicially projected and established,—and every species of relief afforded which it is in the nature of such institutions to require. This equitable jurisdiction, however, is not allowed to usurp upon the proper province of those to whom the administration of the charity may have been confided. In the case of corporations endowed for charitable purposes, the management is usually vested by charter in governors, subject to a controlling or visitatorial power in the founder or his heirs, or in such persons as the founder shall appoint (*f*); and with the proceedings of such functionaries the law does not interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*g*). It is to be observed, however, that when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the crown (*h*), and committed by royal authority to the Lord Chancellor, who may thus be called upon to redress abuses properly falling within the province of a visitor: but this jurisdiction belongs to him in his personal character only, and not as judge of the Court of Chancery (*i*).

With respect to the nature of the charitable trusts, to which the equitable jurisdiction attaches, we may remark that the word *charitable* is to be here understood in a very large sense. For not only gifts for the benefit of the poor are included, but endowments for the advancement of learning (*j*), or institutions for the advancement

(*f*) See Eden *v.* Forster, 2 P. Wms. 326; 3 Salk. 379; 1 Bl. Com. 480; Phillips *v.* Bury, Ld. Raym. 8; R. *v.* Governors of Darlington Free School, 6 Q. B. 682.

(*g*) See case of Kirkby Ravensworth Hospital, 15 Ves. jun. 314; 2 Ves. jun. 42; Case of Berkhampstead Free School, 2 V. & B. 138; Attorney-General *v.* Talbot, 3 Atk. 673; Same *v.* Lock, ibid. 165; Same *v.* Price, ibid. 108.

(*h*) R. *v.* St. Catherine's Hall, 4 T. R. 233. See 1 Bl. Com. 480; sup. p. 143.

(*i*) Co. Litt. 96 a; Ex parte Dann, 9 Ves. 547.

(*j*) Ves. sen. 537.

of science and art, and for any other useful and public purpose (*k*).

The term comprises also donations for pious or religious objects; as to which we may remark, that all objects are considered as religious, which tend to the benefit either of the Established Church of England, or of any body of dissenters sanctioned by law (*l*); and that by the 2 & 3 Will. IV. c. 115 (*m*), trusts for the maintenance of Roman Catholic worship are now placed on a similar footing. And though a trust for the advancement of the Jewish religion, or of any faith hostile to Christianity, has been held illegal, so as to be excluded from the protection of a court of equity (*n*); yet as regards the Jews it is now provided by 9 & 10 Vict. c. 59, s. 2, that from the commencement of that act, her Majesty's subjects professing the Jewish religion shall be liable, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, to the same laws as those to which her Majesty's protestant subjects dissenting from the Church of England are liable, and to no other. Though the definition of charitable trusts is thus wide, we are, nevertheless, to remark that it does not extend to gifts of a strictly private character; for if a sum of money be bequeathed with direction to apply it "to such purposes of benevolence and liberality as the executor shall approve," or even "in private charity," the law will take no notice of such a trust (*o*). On the other hand, where a gift is for a purpose clearly falling within the description of public charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of

(*k*) See Attorney-General *v.* Heelis, 2 Sim. & Stu. 67; Trustees of British Museum *v.* White, ibid. 594; Howse *v.* Chapman, 4 Ves. 551.

(*l*) Attorney-General *v.* Pearson, 3 Meriv. 409; Attorney-General *v.* Cock, 2 Ves. sen. 273. See 18 & 19 Vict. c. 81, s. 9.

(*m*) See 18 & 19 Vict. c. 86, s. 2; 19 & 20 Vict. c. 76; 20 & 21 Vict. c. 76.

(*n*) See In re Masters, &c., of the Bedford Charity, 2 Swanst. 487; 1 Dickens, 258.

(*o*) Morice *v.* Bishop of Durham, 9 Ves. 399; S. C. 10 Ves. 522; 1 Turn. & Russ. 260.

the uncertain limitation of the objects, but the law will provide for it some particular mode of application. In some cases of this description, the right of disposition belongs to the queen, who makes it under her sign manual; in others, it is made by the courts of equity (*p*).

It is a rule with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heir (*q*). But where it is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution, *cyprès*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the donor (*r*). Thus, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provision, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects,—the court directed it to be applied to the further objects of instructing and apprenticing the children in the parishes for which the charity was designed (*s*). Moreover by a late Act, 7 & 8 Vict. c. 45, it is provided, as to meeting-houses founded for dissenters, that so far as no particular religious doctrines or mode of worship shall have been prescribed by the deed or instrument of trust, the usage for twenty-five years shall be taken as conclusive evidence of the doctrines and worship which may be properly observed in such meeting-houses.

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a pre-

(*p*) 1 Turn. & Russ. 260; 10 Ves. 522; Bac. Ab. Ch. Uses.

(*q*) Attorney-General *v.* The Margaret and Regius Professors in Cambridge, 1 Vern. 55.

(*r*) 2 Ves. jun. 380; 2 Mylne & Keen, 576.

(*s*) See Attorney-General *v.* Whitchurch, 3 Ves. 141; The Bishop of Hereford *v.* Adams, 7 Ves. 324; Attorney-General *v.* Bovill, 1 Phill. 762; Attorney-General *v.* Mansfield (Earl of), 14 Sim. 601.

ference, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate in proportion with the others (*t*). When the assets, however, are sufficient, all such legacies remaining unpaid carry interest at four per cent. from the end of one year after the testator's death (*u*).

II. Benevolent Institutions.—Besides charities, there are various institutions in this country designed to encourage the industrious classes in frugal and provident habits, and to afford them some protection from those ordinary casualties which are incident to all men, but fall most severely on persons in the humbler ranks of life. Of these it is remarkable, that they were originally suggested and brought into use by private individuals, though they attracted at length the favourable notice of the legislature, and acts of parliament have been passed to sanction and promote them. Nor is it possible to refer to them, without pausing to pay the tribute justly due to the humanity and wisdom displayed in their establishment; for while they materially contribute to the physical and moral welfare of an important portion of society, they tend by direct consequence to prevent the increase of the public burthens connected with pauperism, and the public disorders resulting from distress among the lower classes. It is but seldom that human laws are able so successfully to reconcile the interests of rich and poor: and to blend, in such perfect harmony, the considerations of benevolence and expediency.

1. *Savings banks.*—These are institutions devised within the last thirty-five years, for the safe custody and increase of the small savings of the industrious poor (*v*). When re-

(*t*) Bac. Ab. Ch. Uses, E.

(*u*) Attorney-General *v.* Hayes, 1 Atk. 356, n.

(*v*) By 5 & 6 Vict. c. 71 (amended by 8 & 9 Vict. c. 27, and 12 & 13 Vict. c. 71), savings banks are provided for non-commisioned officers and soldiers in the army; and by 17

gulated according to act of parliament, certain benefits and protections are afforded to them by law. The statutes containing the regulations, are the 9 Geo. IV. c. 92 (repealing several former provisions), 3 & 4 Will. IV. c. 14; 7 & 8 Vict. c. 83, and 16 & 17 Vict. c. 45 (*x*). The institutions sanctioned by these acts, consist of banks to receive small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest whereof are to be paid out to the depositors as required, deducting only from the produce the necessary expenses of management. The deposits are not to exceed 30*l.* in the whole in any one year (*y*); and no fresh deposit is to be received when the sum to which the depositor is entitled amounts to 150*l.* And where the sum standing in the name of any depositor amounts to 200*l.* (principal and interest included), no interest shall be paid on such deposit so long as it remains at that amount (*z*). The management is vested in trustees, who are prohibited from receiving, directly or indirectly, any benefit from the institution (*a*); and are required to invest the money deposited (beyond what necessarily remains in the hands of the treasurer to answer exigencies) in the Bank of England or Ireland, as the case may require (*b*). The monies invested are to be carried to an account kept in the names of the commissioners for reduction of the national debt, and denominated "The Fund for the Banks for Savings," which affords interest to the trustees at the rate of 3*l.* 5*s.* per cent per annum, the arrears of which are to be carried half-yearly to the account of the principal (*c*). The interest payable to depositors is limited to 3*l.* 0*s.* 10*d.* per cent. (*d*), but the acts

& 18 Vict. c. 104, s. 180; 18 & 19 Vict. c. 91, s. 17, and 19 & 20 Vict. c. 41, for seamen in the navy and mercantile marine. The provisions of these acts are not included in the text.

(*x*) See also 5 & 6 Will. 4, c. 57, as to Scotland; 15 & 16 Vict. c. 60, as to Ireland.

(*y*) 9 Geo. 4, c. 92, s. 35.

(*z*) Sects. 35, 37; and 3 & 4 Will. 4, c. 14, s. 29.

(*a*) 9 Geo. 4, c. 92, s. 6.

(*b*) Sect. 11.

(*c*) Sect. 16; and 7 & 8 Vict. c. 83, s. 1.

(*d*) 7 & 8 Vict. c. 83, s. 2.

permit its accumulation by yearly or half-yearly rests (*e*). Provisions are also made of a nature calculated to save expense to the members of these institutions. In case of the decease of a depositor whose estate does not exceed 50*l*., no legacy duty attaches, and no stamp duty is payable on the probate or administration (*f*); and if any person die, having a deposit not exceeding 50*l*. exclusive of interest, and no will or letters of administration be produced within one month afterwards, the money may be paid to or among such person or persons as shall appear to the trustees or managers, to be the widow, or entitled under the Statute of Distributions (*g*). Upon the same principle it is directed, that the trustees may pay upon any deposit by a woman, to the woman herself, unless her husband or his representative interferes (*h*); and that all disputes between the institution at large and any of its members or their representatives, shall be referred to a cheap method of arbitration pointed out for that purpose (*i*).

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of the parliamentary provisions, upon causing the rules and regulations which they shall establish for its management to be entered in a book, to be kept by one of its officers, for the inspection of depositors. It is also requisite, however, that two copies of the rules shall be submitted to a barrister, officially appointed for the purpose, who is to certify whether the rules are in conformity to law, and pursuant to the legislative enactments (*k*). And one of the copies so certified is to be returned to the trustees, and the other to be trans-

(*e*) 9 Geo. 4, c. 92, s. 17.

(*f*) Sect. 40.

(*g*) 7 & 8 Vict. c. 83, s. 10.

(*h*) Ibid.

(*i*) 9 Geo. 4, c. 92, s. 45. See Crisp *v*. Bunbury, 8 Bing. 394; R. *v*. Witham Savings Bank, 1 Ad. & E. 320; R. *v*. Mildenhall Savings Bank, 6 Ad. & E. 952; and see R. *v*. Norwich Savings Bank (Trustees), 9 Ad. & E. 729.

(*k*) 9 Geo. 4, c. 92, s. 4.

mitted to the commissioners for reduction of the national debt (*l*).

By 16 & 17 Vict. c. 45, it is also provided, that it shall be lawful for the commissioners for reduction of the national debt to grant to any depositor in a savings bank, or other person whom they shall think entitled to become such depositor, any *immediate* or *deferred* life annuities depending on single lives; or *immediate* annuities depending on joint lives with benefit of survivorship, or on the joint continuance of two lives; to any amount not less than four pounds nor more than thirty pounds in the whole for the benefit of any one person: but that no such annuities shall be granted for any person under the age of ten (*m*).

Savings banks have proved so acceptable to the people of this country, that on 20th November, 1855, the deposits in England, Ireland and Scotland amounted, in the aggregate, to more than thirty-four millions sterling, and the number of accounts opened was 1,304,833 (*n*). It seems reasonable, therefore, to consider them as of high importance, both in a moral and political aspect, and as amply deserving that degree of attention which they have received from the legislature.

2. *Friendly societies.*—These establishments are of earlier date than any others of the class under consideration. The statute, however, by which they are now governed, is of recent enactment, being the 18 & 19 Vict. c. 63 (*o*).

(*l*) 7 & 8 Vict. c. 83, c. 19.

(*m*) 16 & 17 Vict. c. 45, s. 2. See also 3 & 4 Will. 4, c. 14, authorizing the establishment of societies to enable persons among the industrious classes to make provision for themselves, by purchasing on advantageous terms a government annuity, for life or term of years, of not less than 4*l.* nor more than 30*l.* per annum.

(*n*) Parliamentary Returns, No. 23, Sess. 1857.

(*o*) By this act all the former acts on the subject are repealed, except 17 & 18 Vict. c. 56, relating to certain friendly societies, and enacting that they shall cease to be friendly societies. The repeal, however, of the former acts is to be without prejudice to societies that had already been formed under them.

A society of this description has for its object the raising of a fund by subscription, for any of the following purposes: 1. The insurance of money, to be paid on the birth of a member's child on the death of a member, or for the funeral expenses of the wife or child of a member. 2. The relief or maintenance of the members, their husbands, wives, children, brothers, sisters, nephews or nieces in old age, sickness or widowhood, or the endowment of members or nominees of members at any age. 3. Any purpose which shall be authorized by one of her Majesty's principal secretaries of state, as a purpose to which the powers and facilities of the act ought to be extended:—but the amount subscribed for, by any one member of a friendly society, must not exceed 200*l.*; nor shall any annuity be so subscribed for, exceeding 30*l.* per annum (*p*). And special provisions are made to prevent fraud and malpractices in the case of the insurance of money payable on the death of a child under ten years (*q*).

The trustee or trustees of friendly societies are required from time to time (with the consent of the society), to invest the fund either in savings banks or in the public funds, or in such other manner as in the act set forth (*r*); and all real and personal estate belonging to the society shall be vested in the trustee or trustees and their successors without any conveyance or assignment whatever, except in the case of stock in the public funds, which shall be transferred into the name of any new trustee or trustees (*s*); and in the event of the death, bankruptcy, or insolvency of or process issued against any officer of the society having its monies in his hands, a priority of payment is secured to the institution (*t*). It is also provided, that if any officer of the society or other person shall by false representation or imposition obtain possession of any property of the society, or having the same in his possession,

(*p*) 18 & 19 Vict. c. 63, s. 9.
(*q*) Sect. 10.
(*r*) Sect. 32.
(*s*) Sect. 18.
(*t*) Sect. 23.

shall withhold or misapply the same, the money may be recovered, and the offender subjected to a penalty, by a summary proceeding before justices of the peace (*u*); and that applications for the removal of any trustee, or other relief, order, or direction, or for the settlement of disputes, (where there is no other prescribed method), shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and that the decision of such court shall not be subject to appeal (*x*).

Any persons wishing to establish a society of this description, may make rules for the purpose (*y*). But two copies of the rules must be made out and transmitted to the "Registrar of Friendly Societies;" and when certified by him as conformable to law and to the Act, one of them is to be returned to the society, and the other he is to keep in such manner as shall be from time to time directed by one of the principal secretaries of state (*z*). Upon being so certified, the rules take immediate effect, and are binding in point of law on all the parties concerned (*a*).

3. *Benefit building societies.*—The sanction and assistance of the legislature have also been granted to societies established to raise a subscription fund, by advances from which the members shall be enabled to build or purchase dwelling-houses, or to purchase land, such advances being secured to the society, by mortgage of the premises so built or purchased. By an act of the 6 & 7 Will. IV.

(*u*) 18 & 19 Vict. c. 63, s. 24.

(*x*) Sect. 41.

(*y*) Sect. 25.

(*z*) Sect. 26.

(*a*) Ibid. It is also provided, as to all benevolent "institutions "formed for the purpose of reliev-"ing the physical wants and neces-"sities of persons in poor circum-"stances, or for improving the "dwellings of the labouring classes, "or for granting pensions, or for "providing habitations for the mem-"bers or other persons elected by "them," that if two copies of their rules be transmitted to the registrar, and he shall certify them as not repugnant to law, certain portions of this act shall be applicable to such institutions; and among others, that which establishes the jurisdiction of the county courts (sect. 11).

c. 32, societies of this description, upon the certificate of their rules, as required by the acts relative to friendly societies, are enabled to transfer shares without payment of stamp duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument. They are also made subject in general to the various provisions of the law relating to friendly societies (*b*).

4. *Industrial and provident societies.*—Lastly, it has been deemed expedient to extend the statutory provisions relating to friendly societies to such associations of working men as have been formed for the mutual relief, maintenance, education, and endowment of the members, their husbands, wives, children or kindred; and for procuring to them food, lodging, clothing and other necessaries, by exercising or carrying on in common their respective trades or handicrafts: and in favour of such associations under the name of "Industrial and provident societies" it has been provided, by 15 & 16 Vict. c. 31 (*c*); 17 & 18 Vict. c. 25; 18 & 19 Vict. c. 63, and 19 & 20 Vict. c. 40, that all the provisions relating to friendly societies shall in general, and subject to certain exceptions, be applicable to them (*d*). And it is particularly enacted, that no society shall be entitled to the benefit of those provisions, unless by its rules the interest of any one member is limited to 200*l.* exclusive of any annuity, and, in the case of annuity, to 30*l.* per annum (*e*).

(*b*) See the following cases which have arisen out of the acts relating to Benefit Building Societies:—Cutbill *v.* Kingdom, 1 Exch. 494; Morrison *v.* Glover, 4 Exch. 430; Seagrave *v.* Pope, 22 L. J. (Ch.) 258; Walker *v.* Giles, 6 C. B. 662; Reeves *v.* White, 17 Q. B. 995; The Queen *v.* Evans, 3 Ell. & Bl. 363; The Queen *v.* Trafford, 4 Ell. & Bl. 122.

(*c*) As to this statute, see Burton *v.* Tannahill, 5 Ell. & Bl. 797.

(*d*) By 15 & 16 Vict. c. 31, the awards of arbitrators, in the case of disputes between the societies and their members, may be referred to the county court of the district.

(*e*) 18 & 19 Vict. c. 63, s. 48.

CHAPTER IV.

OF THE LAWS RELATING TO EDUCATION.

There can be no doubt that in every nation the intellectual culture of the people ought to be considered as an object of high importance; for it is among persons who have to a certain extent had this advantage, that the temptation to the crimes which disturb the peace or militate against the welfare of society will ordinarily be most counteracted by the suggestions of conscience or of prudence; and it is among these, too, that the arts by which the condition of human life is improved and adorned will be found chiefly to flourish. But in this Christian country the object is recommended by consideration of a still higher kind; for those whom Providence has called upon to take part in its public affairs need scarcely be reminded, that, independently of any view to social benefit, it is their imperative duty, as persons professing the Christian faith, to promote by all legitimate means the intellectual advancement of the people, to such an extent at least, and in such a method, as may best ensure their full and practical acquaintance with the truths of the Bible. Upon the question, however, whether it is right or expedient to enforce education among us by laws of a compulsory character, there is fairly room for difference of opinion. That it might be done indeed without violating the principles of civil liberty, will not be doubted perhaps by those who consider it as consistent with those principles, that parents should be compellable (as they already are), to provide out of their means, for the *bodily* wants of those to whom they have given birth; but a real difficulty arises in regard to

the doctrinal differences which unhappily prevail on particular tenets of that religion which all in common profess; for these would make it impossible, consistently with the still more sacred claims of religious liberty, to devise a system of education which should comprise any prescribed course of Christian instruction, and should not at the same time wound the consciences of some section, (more or less numerous,) of the community,—while, on the other hand, the consciences of a large majority would revolt at any system which should leave the subject of Christian instruction unprovided for.

This difficulty serves to explain why the education of the people has not hitherto been made obligatory by the English laws; but as there has long been a growing sense among us of the importance of the object itself, our legislature has long been endeavouring to promote it indirectly, by provisions tending to encourage the exertions, and give effect to the views of such private persons as have been led from time to time, by philanthropic or religious feelings, to establish schools for the benefit of the more indigent classes, conducted upon such Christian principles as the conscience of the founders has in each particular case suggested. We may subject these provisions to the following arrangement:—

I. As to *Grammar Schools.*

By 3 & 4 Vict. c. 77 (*a*), it is recited, that "there are "in England and Wales many endowed schools, both of "royal and private foundation, for the education of boys "or youths wholly or principally in grammar; and the "term grammar has been construed by courts of equity "as having reference only to the dead languages, that is "to say, Greek and Latin," and that "such education at "the period when such schools, or the greater part, were "founded, was supposed not only to be sufficient to

(*a*) See Attorney-General *v.* Bishop of Worcester, 21 L. J. (Ch. Ca.) 25.

"qualify boys or youths for admission to the universities "with a view to the learned professions, but also necessary "for preparing them for the superior trades and mercantile "business;" but that "from the change of times and "other causes, such education, without instruction in other "branches of literature and science, is now of less value "to those who are entitled to avail themselves of such "charitable foundations; whereby such schools have in "many instances ceased to afford a substantial fulfilment "of the intentions of the founders, and the system of "education in such grammar schools ought therefore to "be extended and rendered more generally beneficial, in "order to afford such fulfilment." And the Act proceeds to provide (*b*), that whenever any question may come under consideration in any of the courts of equity, concerning the system of education thereafter to be established in any grammar school, (which it defines to mean any endowed school founded or maintained for teaching Latin and Greek, or either of such languages (*c*),) or the right of admission into the same, it shall be lawful for the court to make decrees or orders for extending the system of education in such school, to other useful branches of literature and science, regulating the right of admission into the same, or establishing schemes for the application of its revenues, paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances, and where any special visitor exists, giving him an opportunity to be heard. In many other respects also the act places the management of all such schools, under the control of the Court of Chancery; and it provides that all powers which it confers on that court may be exercised in cases brought before it on mere

(*b*) 3 & 4 Vict. c. 77, s. 1.

(*c*) Sect. 25. The act however does not extend to the universities, or to such colleges or public schools as therein enumerated, including Eton, Winchester, Harrow, and Rugby. (Sect. 24.)

petition, according to the provisions of the act of 52 Geo. III. c. 101, with regard to charitable trusts (*d*).

II. As to *Sites for Schools*:

By 4 & 5 Vict. c. 38 (*e*), intituled "An Act to afford "farther facilities for the conveyance and endowment of "Sites for Schools," it is provided (*f*), that any person being seised legally or equitably (*g*), in fee simple, fee tail, or for life, in any manor or lands of freehold, copyhold or customary tenure, and having the beneficial interest therein, in possession for the time being, may grant or enfranchise by way of gift, sale, or exchange in fee simple, or for term of years (*h*), any quantity not exceeding one acre of such land (*i*) as a site for a school for the education of poor persons, or for the residence of the master or mistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge; provided that no such grant be made by any person seised for life only, unless the person next in remainder in fee simple, or fee tail (if legally

(*d*) 3 & 4 Vict. c. 77, s. 21. The provisions of the Charitable Trusts Acts, 16 & 17 Vict. c. 137, and 18 & 19 Vict. c. 124, seem also to apply to the grammar schools in question.

(*e*) This act repeals a former act of 6 & 7 Will. 4, c. 70, and is itself explained and amended by 7 & 8 Vict. c. 37, 12 & 13 Vict. c. 49, and 14 & 15 Vict. c. 24.

(*f*) 4 & 5 Vict. c. 38, s. 2.

(*g*) Sect. 5.

(*h*) As to the manner of conveying in the case of copyhold, see 12 & 13 Vict. c. 49, s. 6.

(*i*) By 4 & 5 Vict. c. 38, s. 9, any person or corporation may grant any number of sites for district schools and residences for the master or mistress, though the aggregate quantity granted by such person or corporation shall exceed one acre, provided, that the site of each school and residence do not exceed that extent. By 12 & 13 Vict. c. 49, s. 3, it is declared, that nothing in the first-mentioned act shall prevent any person or corporation from granting any number of sites for distinct schools in the same parish, provided the aggregate quantity granted by such person or corporation in the same parish shall not exceed one acre. And by 14 & 15 Vict. c. 24, that the word "parish" shall in the case of any parish divided into two or more ecclesiastical districts, and whether confined to such parish or comprising part of another parish, be construed to signify each ecclesiastical district.

competent), shall be a party to and join in such grant: provided also, that if any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for such purposes, the rights of all persons in the land shall be barred by such conveyance; but that upon the land ceasing to be used for those purposes, the same shall revert to and become a portion of the said estate held in fee simple or otherwise, or of any such manor or land as aforesaid. It is also enacted, that the same quantity of land may, for the purposes of the Act, be granted, conveyed or enfranchised *by* any *corporation* ecclesiastical or lay, sole or aggregate, in whom it may be, in any manner, vested, (subject however to the proviso that no ecclesiastical corporation sole below the dignity of a bishop may make such grant without the consent in writing of the bishop of the diocese) (*k*); and further, that all grants for the purpose of the education of poor persons may be made *to* any *corporation*, sole or aggregate, to be held by them for such purposes (*l*).

By 15 & 16 Vict. c. 49, all the provisions contained in the acts relating to grants of sites for schools, shall apply and be construed as applicable to schools or colleges for the religious or educational training of the sons of yeomen, or tradesmen, or others, or for the theological training of candidates for holy orders,—which are erected or maintained in part by charitable aid, and which in part are self-supporting: provided, however, that no ecclesiastical corporation, sole or aggregate, shall be authorized to grant any site under that act, except for schools or colleges in union with the Established Church; or to grant by way of gift, without a valuable consideration, for any of the purposes of that act, any greater quantity of land in the whole than two acres.

(*k*) 4 & 5 Vict. c. 38, s. 6.

(*l*) Sect. 7. See also for explanation and extension of the law on this subject, 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 13 & 14 Vict. c. 28; 14 & 15 Vict. c. 24. And see provisions as to the appropriation under inclosures, of allotments for sites of schools, 8 & 9 Vict. c. 118, s. 34; 20 & 21 Vict. c. 31, s. 13.

By 17 & 18 Vict. c. 112 (called "The Literary and Scientific Institutions Act, 1854"), after reciting that it is expedient that greater facilities should be afforded for procuring and settling sites and buildings in trust for institutions established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, and that other provisions should be made for improving the legal condition of such institutions,—it is provided (*m*) that such persons and corporations as described in the 4 & 5 Vict. c. 38, may grant, convey, or enfranchise by way of gift, sale, or exchange in fee simple, or for term of years, any quantity not exceeding one acre of their land (*n*), (whether built upon or not,) as a site for any such institution as thereinafter described (*o*); provided, however, that no such grant made by a person seised only for life shall be valid, unless if there be any person next entitled in remainder in fee simple, or fee tail, and legally competent in that behalf, he shall be a party to and join in such grant; and that where any waste or commonable land is gratuitously conveyed by any lord of a manor, the rights of all commoners and others having interest shall be barred; and that upon any land so granted by way of gift ceasing to be used for the purposes of the institution, it shall revert to and become a portion of the estate out of

(*m*) 17 & 18 Vict. c. 112, ss. 1, 4.

(*n*) By sect. 10, any person or corporation may grant any number of sites for distinct or separate institutions, although the aggregate quantity granted by such person shall exceed one acre, provided the site of each institution do not exceed that extent.

(*o*) The description is in sect. 33, which provides that the act shall apply to every institution "for the "time being established for the "promotion of science, literature or "the fine arts, for adult instruction, "the diffusion of useful knowledge, "the foundation or maintenance of "libraries or reading-rooms for "general use among the members "or open to the public, of public "museums and galleries of paint- "ings and other works of art, collec- "tions of natural history, mechanical "and philosophical inventions, in- "struments or designs: provided, "that the Royal institution, and the "London institution for the ad- "vancement of literature and the "diffusion of useful knowledge, shall "be exempt from the operation of "that act."

which it was granted, except only that when the institution is removed to another site the land may be exchanged or sold for the benefit of the institution. By the same Act of 17 & 18 Vict. a variety of provisions, such as cannot be abstracted here consistently with the limits of the work, are made with reference to such institutions, and relating chiefly to the persons by and to whom, and the manner in which, conveyances may be made, and the form of such conveyances; the subsequent sale or exchange of the land conveyed; the liability of the trustees to whom such land is conveyed in trust for the institution, to rates, taxes, charges, costs and expenses; the manner in which the personal property of the institution shall be deemed vested; the manner in which suits by or against them may be brought, and in which judgment shall be enforced; the power to make bye-laws; the liability of individual members to be sued or prosecuted in matters affecting the property of the institution; and the manner in which the institution may proceed to effect an alteration, extension, or abridgement of the purposes for which they were established, or to effect their own dissolution, or the adjustment of their affairs.

III. As to *Parliamentary Grants for the purposes of Education.*

By 7 & 8 Vict. c. 37—after reciting that during several years past divers sums of money had been granted by parliament to her majesty, to be applied for the purpose of promoting the education of the poor in Great Britain, and that similar grants might thereafter be made (*p*), and that her majesty had appointed a committee of her council

(*p*) Such grants have accordingly continued to be annually made. In the year 1856 the annual grant for public education in Great Britain was 451,213*l.*; for public education in Ireland, 227,641*l.* (19 & 20 Vict. c. 105, s. 24.) The money so voted from time to time has been applied by the Committee of the Privy Council, without preference of any particular religious denomination, in aid of the numerous schools established throughout the kingdom by private benevolence, for the religious, moral, and intellectual improvement of the indigent classes.

to receive application for assistance from such grants, and to report thereon, and to advise her as to the terms and conditions upon which such assistance should be granted, and that many such reports had been made and approved of by her majesty, and the terms and conditions having been assented to by the applicants, grants had been made out of the said fund, and that in some cases, by reason of the deeds of endowment of schools, in respect of which such application had been made, having been executed before the grant was made, such terms and conditions had not been and could not be made permanently binding on the estate—it is provided, that where in such cases, any such grant had been or shall be made in aid of the purchase of the site, or of the erection, enlargement, or repair of the school, or of the residence of the master or mistress, or of the furnishing of the school, upon terms and conditions to provide for the inspection of the school by an Inspector appointed by her Majesty, such terms and conditions shall be obligatory on the trustees and managers of the school, in like manner as if they had been inserted in the conveyance of the site of the school, or in the declaration of the trusts thereof: provided that such terms and conditions shall have been, or shall be, set forth in some document in writing, signed by the trustees, or the major part of them, or by the party conveying the site, in the case of a voluntary gift.

By 18 & 19 Vict. c. 131, reciting that it was expedient that greater security should be afforded for the due application of money advanced in certain cases to the trustees or managers of schools by the lords commissioners of the treasury, out of the parliamentary grant for the promotion of education in Great Britain,—it is provided, that where any such grant hath been or shall be made, under the advice of the committee of council on education, to the trustees, manager, or other persons applying on behalf of any school, with consent of the trustees or persons holding the legal estate thereof, for or towards the purchase of the

site, or the erection, enlargement, or repair of the school, or the residence of the master or mistress, or the furnishing such school or residence, no sale, exchange, or mortgage of the premises in exercise of any power contained in the conveyance or other deed relating thereto, or under any other legal authority, shall be valid, unless either the consent of the secretary of state for the home department, in writing under his hand, be given to the same; or unless the amount of the grant shall be repaid. But nothing in this act contained is to affect a purchaser for valuable consideration without notice, nor to be deemed to apply to any school in respect to any grant *theretofore* made, without any bond, covenant, or other personal obligations or conditions against the sale, exchange, or mortgage of the premises without such consent as aforesaid having been entered into by the trustees, or persons holding the legal estate, with the committee of council on education.

And lastly, by 19 & 20 Vict. c. 116, her majesty is empowered from time to time, by warrant under her royal sign manual, to appoint any member of the privy council to be during her pleasure Vice-president of the committee of the privy council on education, and to direct that a salary not exceeding 2,000*l.* per annum be paid to him out of any monies provided for that purpose by parliament; and such Vice-president shall be capable of being elected, sitting and voting as a member of the House of Commons.

IV. As to *Education under the Poor Law.*

By 7 & 8 Vict. c. 101, s. 40 (amended by 11 & 12 Vict. c. 82, and 13 & 14 Vict. cc. 11, 101), the Poor Law Board (*q*) has power to combine unions, or parishes not in union, or such parishes and unions, into school districts for the management of any class or classes of infant poor not above the age of sixteen, (being chargeable to such parish or

(*q*) This power was given to the Poor Law Commissioners, but by 10 & 11 Vict. c. 109, s. 10, all the powers of those commissioners are transferred to the Poor Law Board.

union) who are orphans, or are deserted by their parents, or whose parents or guardians consent to their being placed in the school of such district. And by sect. 42, a Board shall be constituted for every such district for the maintenance of a school, and such Board shall appoint, with consent of the bishop of the diocese, at least one chaplain of the Established Church, who shall be empowered to superintend the religious instruction of the infant poor under their control; provided always, that no inmate shall be obliged to attend any religious service celebrated in a mode contrary to his religious principles: nor shall he be educated in any religious creed other than that professed by his parents, and to which his parents may object, or in case of an orphan or deserted child, to which his next of kin may object; and it shall be lawful for any minister of the persuasion professed by any adult inmate, or in which any child has been brought up, or in which the parents or next of kin desire him to be instructed, to *visit* the school at the request of such adult inmate, for the purpose of affording him religious assistance, or to visit such child for the purpose of instructing him in the principles of his religion; and it shall be lawful at all times for any Inspector of schools appointed by her majesty in council, to visit such schools, to examine into the proficiency of the scholars therein.

And by 18 Vict. c. 34, it is provided, that the guardians of any union, or any parish wherein the relief of the poor is administered by a board of guardians, may grant relief for the purpose of enabling any poor person lawfully relieved out of the workhouse, to provide education for any child of such person (between the ages of four and sixteen), in any school to be approved of by the guardians, for such time and under such conditions as they shall see fit: provided, however, that the Poor Law Board shall have power to regulate the proceedings of the guardians as to the manner of such relief or education; and also that it shall not be lawful for the guardians to impose such education as a condition of relief.

V. As to *Reformatory Schools*.

By 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 55, it is provided, that the secretary of state for the home department may, upon application made to him by the directors or managers of any school or institution for the better training of juvenile offenders, established by voluntary contributions in Great Britain, direct one of her majesty's Inspectors of prisons to examine and report to him upon such institution; and may certify under his hand and seal that it is useful and sufficient for its purpose; and that it shall be lawful for any court, magistrate or justice of the peace, before whom any person, under the age of sixteen, shall be convicted of any offence, to direct that, in addition to the legal punishment, such person shall be sent to any such institution (duly certified as aforesaid, and the directors or managers of which may be willing to receive the offender), as may thereafter and before the expiration of the imprisonment be directed by the chairman or deputy chairman of the court, or by the judge or magistrate; and that the offender so sent shall be there detained for a period not less than two, nor more than five years; and that the parent or step parent, if of sufficient ability, shall be liable to contribute to his or her support or maintenance such sum not exceeding five shillings a week, as the justices or magistrate passing sentence may think reasonable. But it is provided, that no offender shall be sent to any such institution unless the sentence shall be one of imprisonment for fourteen days at the least; and that the secretary of state may at any time order a discharge from the institution.

VI. As to *Industrial Schools*.

By 20 & 21 Vict. c. 48, the Committee of the Privy Council on Education may, upon application from the managers of any school in which industrial training is provided, and in which children are fed as well as taught, direct an examination to be made as to its conditions and

regulations; and if upon the report of the examiner the committee are satisfied therewith, they may grant a certificate constituting such school a certified Industrial School within the meaning of the Act; and when any child above the age of seven and under that of fourteen is taken into custody on a charge of vagrancy under any local or general Act, any two justices of the peace may make inquiry into the matter, and may on conviction of the child deliver him up to his parent, guardian, or nearest adult relative, on his giving an assurance in writing that he will be responsible for the good behaviour of the child for any period not exceeding twelve months; and, in default of such assurance, may order the child to be sent, for such period as they may think necessary for his education and training, to any certified Industrial School under that Act, the managers of which shall be willing to receive him. The parent, also, may be ordered by the justices, at their discretion, to pay the managers of the school a weekly sum, not exceeding three shillings, until the child attains the age of fifteen, or is discharged; but it is provided, that after that age no person shall be detained in any such school against his consent. And this statute further enacts, that the guardians of any union or parish, wherein relief to the poor is administered by a board of guardians, may, if they deem proper (with consent of the Poor Law Board), contract with the managers of any such school for the maintenance and education of any pauper child.

CHAPTER V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS, AND THEIR MANAGEMENT.

We had occasion in a former place to explain the general state of the law in reference to idiots and lunatics (*a*). But the numerous provisions made by the legislature, in regard to the safe custody and proper treatment of these persons, are of a nature to deserve more particular attention than we were able at that part of the work to bestow upon them; and we shall now advert to them more fully, under the head of Lunatic Asylums.

By this term we understand all houses established for the reception of insane persons.

They are of various descriptions: some being established by law, for the public benefit, under the denomination of County (or Borough) Lunatic Asylums; others instituted for the public benefit, by the endowment of charitable donors; and others being private houses kept by individuals, for their own profit.

We propose under the present head to treat, I. Of the provisions made by law for the establishment and maintenance of county or borough lunatic asylums. II. Of the regulations as to the care and custody of insane persons in lunatic asylums or houses, in general.

I. County lunatic asylums are of modern origin, having been first established by 48 Geo. III. c. 96; but the regulations at present in force are those contained in 16 & 17

(*a*) Vide sup. vol. I. p. 474; vol. II. pp. 61, 254, 519.

Vict. c. 97 (called "The Lunatic Asylums Act, 1853"), amended by 18 & 19 Vict. c. 105, and 19 & 20 Vict. c. 87. By the provisions of these acts, it is incumbent on the justices of every county or borough (not being already provided therewith), to take measures to erect or provide a sufficient asylum for its pauper lunatics, either separately or in union with one or more other counties or boroughs, or with the subscribers to some asylum already established by voluntary subscription (*b*); and the expenses of such institutions, so far as they are not covered by voluntary contributions, are to be defrayed by county or borough rates (*c*), and the management to be vested in a *committee of visitors*, to be elected yearly by the justices of the county or borough, or (in case of union with an asylum supported by voluntary subscription), partly by the justices and partly by the subscribers (*d*).

The purpose for which they are mainly designed is to receive the insane paupers of the county or borough,—a class of persons for whom it may be said in general that there is no other resource; particularly since the provision of the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76, s. 45, by which it is made penal to confine insane persons, who are dangerous, more than fourteen days in any workhouse.

The provisions for the reception of this class are briefly as follows:—

Every relieving officer of any parish within a union, or under a board of guardians,—and every overseer of a parish where there is no relieving officer,—who shall have knowledge that any pauper resident in such parish is, or is deemed to be, a lunatic, and a proper person to be sent to an asylum (*e*), is to give notice thereof to some justice of

(*b*) 16 & 17 Vict. c. 97, s. 3.

(*c*) Sect. 46.

(*d*) Sect. 22.

(*e*) The *medical officer* for the union or parish is charged with the duty of visiting pauper lunatics there and giving notice to the relieving officer or overseer of every person proper to be sent to an asylum. (16 & 17 Vict. c. 97, s. 66.)

the county or borough, who shall thereupon make an order for the pauper to be brought before him or some other justice of the county or borough; and the justice before whom the pauper shall be brought shall call to his assistance a physician, surgeon, or apothecary; and if upon examination of the pauper, such medical man signs a certificate in a fixed form, to the effect that the pauper is a lunatic and a proper person to be taken charge of, and the justice is satisfied that such is the fact, he shall, by order in a fixed form, direct the pauper to be received into the asylum of that county or borough; or in case of deficiency of room or under special circumstances, into any other asylum, or under special circumstances, into any registered hospital or licensed house (*f*). And it is further provided, that it shall be lawful for any justice, upon his own knowledge, and without any notice having been given him, to examine any pauper deemed to be lunatic, at his own abode or elsewhere, and to proceed in all respects as if the pauper had been brought before him in pursuance of an order for that purpose; and also, that in case any pauper deemed to be lunatic cannot, on account of his health or other cause, be conveniently taken before any justice, he may be examined at his own abode or elsewhere, by an officiating clergyman of the parish, together with the relieving officer (or overseer), who shall proceed thereupon in the same manner as before directed in the case of the justice; and also that where the certificate is signed by the medical officer of the parish or union, as well as by some other medical man called in as aforesaid to the assistance of the justice, or clergyman, relieving officer or overseer, such joint certificate, (or two certificates as the case may be,) shall be received by the justice, or clergyman, and relieving officer or overseer, as conclusive evidence that the pauper is a lunatic and a proper person to be taken charge of; and he or they shall make the order accordingly (*g*).

It is not, however, to the lunatic paupers only of the

(*f*) 16 & 17 Vict. c. 97, ss. 67, 72.

(*g*) Sect. 67.

county or borough that admission into the asylum is allowed. An order for it may also be made in favour of persons found in the county or borough, who (whether paupers or not) are wandering at large; or not under proper care or control; or cruelly treated or neglected by the persons having the care of them (*h*): and where the asylum is more than sufficient for the accommodation of cases within the county or borough, it is competent to the visitors to allow the admission of pauper lunatics of any other county or borough; or (if the visitors think fit) lunatics not paupers (*i*). In the latter case, the visitors are at liberty to prescribe as the condition of admission, that the person applying for it shall give an undertaking for the due payment of the weekly charge for lodging, maintenance, and other necessaries, (as to which it is provided, that a lunatic not being a pauper shall have the same accommodation in all respects as the pauper lunatics (*k*)); but in every case of the reception of a pauper lunatic, he shall be chargeable to the parish from which he is sent, or to any other parish to which he can be shown to belong, or if it appears that his settlement cannot be ascertained, then to the county at large in which he was found (*l*); or if he was found in a borough not liable to contribute to the county expenditure, then to the borough (*m*).

(*h*) Sect. 68. In the first of these cases the order for admission may be made by one justice, but in the two last the order of two justices is required.

(*i*) Sect. 43. By 1 & 2 Vict. c. 14, it is provided, as to lunatics *meditating crime*, that they may be examined by two justices (assisted by a medical man), and sent by them to the county lunatic asylum; and, by 3 & 4 Vict. c. 54, that, if a person in custody under any *criminal charge* shall appear to be insane, and the insanity be certified by two justices of the place where he is confined, and also by two physicians or surgeons, a principal secretary of state may direct his removal to some county lunatic asylum. See also 39 & 40 Geo. 3, c. 94, as to the safe custody of persons *acquitted of crime on the ground of insanity*. These enactments are still in force, and are not affected by the statutes considered in the text. (See 16 & 17 Vict. c. 97, s. 133.)

(*k*) 16 & 17 Vict. c. 97, s. 48.

(*l*) Sects. 95—98.

(*m*) 18 & 19 Vict. c. 105, s. 14.

II. As to the regulations, care, and custody of lunatics in general, they may be summarily stated as follows.

By 8 & 9 Vict. c. 100 (*n*) (amended by 16 & 17 Vict. c. 96 (*o*)), it is not lawful for any person to receive two or more lunatics into any house, unless such house shall be a county or borough lunatic asylum (*p*), or a hospital duly registered under that act, or a house for the time being duly licensed under that or some other act of parliament (*q*); and in general no person can be legally received in such hospital, or in a house so licensed, without a written order from the person sending him, and medical certificates of two physicians, surgeons or apothecaries, in such form as prescribed by the acts (*r*); nor can even a single person be legally received or taken charge of in an unlicensed house, as a lunatic, without such order and certificate, unless the person receiving him be one deriving no profit from the charge, or be his committee, appointed by the lord chancellor (*s*). But in the case of a pauper lunatic the order is to be under the hand of a justice of the peace, or the officiating clergyman and one of the overseers or the relieving officer of the parish to which he belongs; and the medical certificate (*t*) is to be signed by one physician, surgeon, or apothecary. The licences in question are to be granted (for any period not exceeding thirteen calendar months), in London and Westminster, and many of the suburban parishes, by a board of persons composed in part of medical men and of barristers, established by

(*n*) By this act the 2 & 3 Will. 4, c. 107; 3 & 4 Will. 4, c. 64; 5 & 6 Will. 4, c. 22; 1 & 2 Vict. c. 73; 5 Vict. c. 4; and 5 & 6 Vict. c. 87, are repealed, except so far as they repeal any other acts. The Royal Hospital of Bethlehem was excepted in most respects from the operation of 8 & 9 Vict. c. 100; but by 16 & 17 Vict. c. 96, s. 35, it is now fully subjected to the provisions of both the acts, and is to be registered as a hospital accordingly.

(*o*) See also 18 & 19 Vict. c. 105.

(*p*) 8 & 9 Vict. c. 100, s. 114.

(*q*) Ibid. ss. 43, 44.

(*r*) 16 & 17 Vict. c. 96, ss. 4, 7.

(*s*) 8 & 9 Vict. c. 100, s. 90; 16 & 17 Vict. c. 96, s. 8.

(*t*) 8 & 9 Vict. c. 100, s. 48; 16 & 17 Vict. c. 96, s. 7.

8 & 9 Vict. c. 100, s. 3, under the name of "Commissioners in Lunacy," at a quarterly or special meeting; in the country, by the justices for the county or borough (u) in general or quarter sessions (x); and many provisions are made, but of a kind too minute and specific to be particularly detailed in this place, for the effectual superintendence of registered hospitals and licensed houses,—among which are comprised, *inter alia*, enactments, that the keepers of such houses shall constantly report the admission, death, removal, discharge, or escape of patients (y); that the houses shall be provided with proper medical attendance (z); that they shall be frequently visited and inspected by the commissioners, and, (in the case of houses in the country,) by visitors appointed by the magistrates at quarter sessions (a),—at uncertain and unexpected intervals, and in certain cases even by night (b); that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, in March in every year, of the state of the houses visited by them, and the care of the patients therein (c); and that any person detained therein without sufficient cause, with the exception of persons found lunatic under a commission, or confined by order of the secretary of state for the home department, or under the order of any court of criminal jurisdiction, may be set at liberty by the commissioners or visitors (d).

Besides these provisions in regard to registered hospitals and licensed houses, the commissioners are moreover directed to visit, once in every year, the county lunatic asylums and every gaol or workhouse where any lunatics may be confined; and to report as to their condition,

(u) If it is in a borough, the consent of the recorder must be obtained. 8 & 9 Vict. c. 100, s. 31.

(x) 8 & 9 Vict. c. 100, s. 17.

(y) Sects. 53, 54, 55.

(z) Sects. 57, 58, 59.

(a) Sects. 61, 62.

(b) Sect. 71.

(c) Sect. 88; 16 & 17 Vict. c. 96, s. 32.

(d) 8 & 9 Vict. c. 100, ss. 76—81.

system, and regulations (*e*). Authority is also given to the lord chancellor, or a principal secretary of state, to direct any of the commissioners or any other person to visit and examine at any time any lunatic under the care of a committee, or under the care of a person deriving no profit from the charge, or confined as a criminal or state prisoner, or under any restraint whatever as a lunatic.

(*e*) 8 & 9 Vict. c. 100, s. 110.

CHAPTER VI.

OF THE LAWS RELATING TO GAOLS.

ANOTHER subject on which very anxious and elaborate attention has been repeatedly bestowed by the legislature, is that of gaols.

It is a principle of the common law, founded on a due regard to the public liberty and welfare, that a gaol can be erected only by the authority of parliament (*a*): and the same policy has also established the doctrine that a gaol when once erected belongs in every instance to the sovereign (*b*); being thus placed under the general control and protection of the same executive power from which emanates, in contemplation of law, the whole administration of civil and criminal justice.

With respect to the immediate care and superintendence of gaols, they are vested in some particular cases, by immemorial usage, in the lords of franchises (*c*), or privileged jurisdictions,—but these instances are few; and, in other cases, by the general effect of the statute law on this subject, they belong to the sheriffs of the counties in which the gaols are respectively situate (*d*). The actual

(*a*) 2 Inst. 705; Bac. Abr. Gaol (A.); see R. *v.* Earl of Exeter, 6 T. R. 373; R. *v.* Justices of Lancashire, 11 Ad. & El. 144.

(*b*) 2 Inst. 589. The lands purchased for a prison or a court-house are vested in the persons or body corporate to whom the conveyance thereof shall be made, in trust for the public purpose. (See 5 & 6 Vict. c. 98, s. 1.)

(*c*) 2 Inst. 598; 1 Hale, P. C. 598; Bac. Abr. Gaol (B.)

(*d*) 14 Edw. 3, st. 1, c. 10; 19 Hen. 7, c. 10; 4 Geo. 4, c. 64, s. 6. In 17 & 18 Vict. c. 115, s. 4, it is recited, that "in some counties in "England and Wales, the keeper or

keeper or gaoler is in contemplation of law only the sheriff's deputy; and if he negligently suffers a prisoner to escape, the sheriff, as his principal, will be responsible (*e*). The gaoler himself, however, is punishable for any official misconduct, and that by fine and imprisonment, and, in general, forfeiture of office. In the case, indeed, of his voluntarily permitting the escape of a felon, he becomes implicated in his crime (*f*).

There is a species of gaol which does not fall under the sheriff's charge; but is governed by a keeper wholly independent of that officer. It is termed, by way of distinction from the gaol properly so called (or common gaol), a House of Correction, or (in the city of London) a Bridewell (*g*).

These houses of correction (which were first established, as it would seem, in the reign of Elizabeth) were originally designed for the penal confinement (after conviction) of paupers refusing to work, and other persons falling under the legal description of *vagrant* (*h*). And this was at first their only application; for in other cases the common gaol of the county, city, or town in which the offence was triable, was (generally speaking) the only legal place of commitment (*i*). The practice however in this respect was to a certain extent altered in the reign of George the first, when "vagrants and other persons charged with small offences" were for the first time allowed to be committed to the house of correction for safe custody before convic-

"governor of the common gaol is, "by usage or under some legal authority, appointed by the justices "in quarter session assembled, and "not by the sheriff."

(*e*) 1 Hale, P. C. 597; 2 Hawk. c. 19, ss. 27, 29; R. *v.* Fell, 1 Ld. Raym. 424. As to the office of the sheriff in general, vide sup. vol. II. p. 629.

(*f*) Vide post, bk. VI. c. IX.; R. *v.* Fell, 1 Ld. Raym. 424. As to the liability of gaolers for abuses committed, see York *v.* Chapman, 10 Ad. & El. 207; S. C. 11 Ad. & El. 813; see also 32 Geo. 2, c. 28.

(*g*) Jacob, Dict. tit. House of Correction; Style, 57. As to *Bridewell*, see Strype's Stow, l. 5, c. 30. By 15 & 16 Vict. c. 70, a new house of correction is established for the city of London.

(*h*) 39 Eliz. c. 4; Jacob, Dict. in tit.

(*i*) 5 Hen. 4, c. 10; 23 Hen. 8, c. 2; 6 Geo. 1, c. 19.

tion (*k*); and at a subsequent period it was provided, that as to vagrants the house of correction should be the *only* legal place of commitment (*l*). The uses however of a gaol of this description have been lately carried much farther. For by 5 & 6 Will. IV. c. 38, ss. 3, 4, reciting that great inconvenience and expense had been found to result from the practice of committing to the common gaol, where it happens to be remote from the place of trial,—it is enacted, that a justice of the peace (or coroner) may commit, for safe custody, to any house of correction situate near the place where the assizes or sessions are to be held; and that offenders who have been sentenced in those courts may be committed, in execution of their sentence, to any house of correction for the county. And by 14 & 15 Vict. c. 55, ss. 20, 21, it is provided, that, after any gaol or house of correction for any county has, by order of the justices at quarter sessions (approved by a principal secretary of state), been declared a fit prison for the purpose,—it shall be lawful to commit to such gaol or house of correction, for trial at the next assizes for the county, any person charged with an offence triable at such assizes; it being directed, however, that every person so committed shall, in due time, be removed to the common gaol, in order to take his trial (*m*).

The erection, maintenance, and regulation of gaols are provided for by certain acts of parliament, of which the 4 Geo. IV. c. 64, is the principal (*n*). These acts, which

(*k*) 6 Geo. 1, c. 19, s. 2.

(*l*) 4 Geo. 4, c. 64, s. 7.

(*m*) By 13 & 14 Vict. c. 91, the justices of a borough, with a separate gaol or house of correction, may commit prisoners to the same for trial at the assizes, but no prisoner charged with *murder* can be so dealt with, but he must be committed to the county gaol, and all the prisoners must be transferred to such county gaol, before their trial.

(*n*) As to 4 Geo. 4, c. 64, see R. v. Cope, 6 A. & E. 226. See also as to prisons, 5 Geo. 4, cc. 12, 85; 6 Geo. 4, c. 40; 7 Geo. 4, c. 18; 5 & 6 Will. 4, cc. 38, 76, s. 114, &c.; 6 & 7 Will. 4, c. 105; 7 Will. 4 & 1 Vict. cc 55, 78 (see Queen v. Mayor of York, 22 L. J., M. C. 73); 2 & 3 Vict. c. 56; 3 & 4 Vict. c. [illegible]; 5 & 6 Vict. cc. 53, 98 (see Queen v. New Sarum, 2 Ell. & Bl. 454); Bramston v. Colchester, Mayor of, 25 L. J.,

apply generally to all gaols, (subject only to a few exceptions,) provide (among other things), that at the expense of every county in England and Wales there shall be maintained one common gaol (*o*); and at the expense of every county or division having a distinct commission of the peace, at least one house of correction (*p*); the jurisdiction as to maintaining and visiting these prisons being vested in the justices of the peace in quarter sessions assembled, or (in the case of separate divisions), in a court of gaol sessions, of which the justices of each division shall be members (*q*). Powers are besides given to the justices at quarter sessions, to direct gaols, (where wanting), to be built, or those already existing to be rebuilt, altered, or repaired, as occasion may require (*r*); the expenses thereby incurred being defrayed by the means of rates assessed on the county (*s*). Similar powers as to building, enlarging and repairing gaols are also given, as regards boroughs, to the town councils of such boroughs (*t*); and they are authorized to borrow money for those purposes (*u*). Provision is also made enabling the justices of any county, and the council of any borough, to agree with one or more other counties or boroughs towards building, altering or repairing any prison to be used as a *district* prison;

M. C. 73); 7 & 8 Vict. c. 50; 11 & 12 Vict. c. 39; 12 & 13 Vict. c. 82; 13 & 14 Vict. c. 91; 16 & 17 Vict. c. 43; 17 & 18 Vict. c. 115. The acts prior to 4 Geo. 4, c. 64, are almost all recited in that statute; which (for most purposes) repeals them.

(*o*) As to the particular case of the gaol of Newgate, which, though in London (a county in itself), is nevertheless a gaol for the county of Middlesex, see R. *v.* Cope, 6 Ad. & El. 226.

(*p*) 4 Geo. 4, c. 64, s. 2.

(*q*) 4 Geo. 4, c. 64, s. 4; 5 Geo. 4, c. 12, s. 1. By 7 Will. 4 & 1 Vict. c. 78, s. 14, all county gaols, courts, &c., though locally included within the boundaries of a city or borough, under 6 & 7 Will. 4, c. 103, shall be nevertheless considered as still under the exclusive jurisdiction of the county.

(*r*) 4 Geo. 4, c. 64, s. 45; 5 & 6 Will. 4, c. 76, s. 116.

(*s*) 4 Geo. 4, c. 64, s. 68; 11 & 12 Vict. c. 42, s. 26.

(*t*) 7 Will. 4 & 1 Vict. c. 78, s. 37.

(*u*) 5 & 6 Vict. c. 98, s. 3. And see 11 & 12 Vict. c. 39, to facilitate the raising of money by corporate bodies for building or repairing prisons.

and towards providing and maintaining a court-house for the district (*x*). And it is provided that every borough that has obtained a grant of a separate court of sessions of the peace, and that has not entered into any contract or agreement for the use of the gaol or house of correction of the county or of some other borough or district prison,—shall be bound to maintain at least one common gaol and one house of correction of its own (*y*).

It thus appears that the expenses connected with gaols, are in general to be defrayed at the public charge of the county or town to which they respectively belong. In some cases, however, that obligation attaches, by antient custom or otherwise, to certain individuals or bodies corporate; and it is to be observed that the general provisions above referred to, have no effect in exempting such persons from their antecedent liability (*z*).

From the manner in which gaols are erected and maintained, we may now pass to the consideration of the manner in which they are regulated. Every prison to which these acts extend is to have a resident keeper, and resident matron to superintend the female prisoners; as also a visiting chaplain and surgeon (*a*); and is to be visited three times a year by two or more justices of the peace, appointed at the quarter sessions for that purpose (*b*). The

(*x*) 5 & 6 Vict. c. 53; 7 & 8 Vict. c. 50. And see 5 & 6 Vict. c. 109, and 11 & 12 Vict. c. 101, as to providing *lock-up houses* for temporary confinement previous to commitment for trial, and enabling counties and boroughs to enter into agreement with each other as to erecting the same.

(*y*) 5 & 6 Vict. c. 98, s. 15. (See 7 & 8 Vict. c. 93; and Bramston *v.* Mayor of Colchester, 6 Ell. & Bl. 246.) By 12 & 13 Vict. c. 82, no borough to which a separate court of quarter sessions has been granted, and which shall possess a sufficient gaol and house of correction, shall be liable to contribute to any new gaol for the county; though it shall be liable to a charge in respect to the expenses of persons committed for offences within the borough, and sent to the prison of the county.

(*z*) 5 Geo. 4, c. 85, s. 15.

(*a*) 4 Geo. 4, c. 64, ss. 10, 28, 33. As to the appointment of the surgeon, see Hammond *v.* Peacock, 1 Exch. 41.

(*b*) 4 Geo. 4, c. 64, s. 16.

visitors thus appointed are to make reports at every session, as to the state of the prisons and prisoners within their jurisdiction (*c*); which are to be the basis of a general report from the quarter sessions, to be drawn up and transmitted annually by the chairman to a principal secretary of state; and to be afterwards laid before both houses of parliament (*d*). It is also provided, that any justice of the peace, within whose jurisdiction a gaol is situate, may enter and examine it, and report upon abuses, without being appointed a visitor (*e*).

With respect to the particular management of the prisoners, the acts contain a variety of provisions too numerous and specific for insertion in this place. In addition to which permanent legislative regulations, others may from time to time (*f*) be laid down at the discretion of the proper authorities; that is (as regards the London prisoners), the court of mayor and aldermen of that city, and (as regards all others), the justices of the peace within whose jurisdiction the prison is situate (*g*). But it is provided that no such additional rules shall be enforced, until they shall be submitted to one of the principal secretaries of state, and his certificate as to their propriety shall be obtained (*h*). The subject of prison discipline indeed is placed still more directly under the control of her majesty's government,—for the clerks of the peace for every county, and the chief magistrates of all towns, are directed to transmit annually to one of the principal secretaries of state copies of all regulations in force in their respective prisons; and also of such new and additional rules as may be proposed for the government thereof: and the secretary of state may make such alterations in the same, or such additions thereto, as he may think expedient,—or, in any case where no copies

(*c*) 4 Geo. 4, c. 64, s. 23.

(*d*) Ibid. ss. 22, 24; 2 & 3 Vict. c. 56, s. 10.

(*e*) 4 Geo. 4, c. 64, s. 17.

(*f*) See the preamble to the same act.

(*g*) 4 Geo. 4, c. 64, s. 1[illegible] 5 & 6 Will. 4, c. 76, s. 116; 7 Will. 4 & 1 Vict. c. 78, s. 38.

(*h*) 5 & 6 Will. 4, c. 38.

are transmitted, he may certify what rules he may deem necessary for the government of the prison in respect of which such omission takes place,—and the rules so certified shall take effect in law, and supersede all others theretofore established by the subordinate authorities. A principal secretary of state is also empowered to appoint a sufficient number of proper persons as inspectors for every place of imprisonment in Great Britain; who are to visit and inquire into the state of these establishments, and make annual reports of the results of their inquiries to a principal secretary of state; which reports shall be afterwards laid before both houses of parliament (*i*).

Besides the ordinary gaols and houses of correction for counties and boroughs, there are some particular prisons which are the subject of separate and specific regulation. As—

1. The *Queen's Prison*; which is appropriated to the debtors (*k*) and criminals confined under process or by authority of the superior courts at Westminster, and the High Court of Admiralty; and also to persons imprisoned under the bankrupt law (*l*). There existed till of late, three separate gaols for the reception of such prisoners, viz. the Queen's Bench, the Fleet, and the Marshalsea Prisons. But by 5 & 6 Vict. c. 22, (amended by 11 & 12 Vict. c. 7,) these are now consolidated into one (*m*). Towards the maintenance of the prisoners herein, contribution is made out of the county stock or rates of the several counties and divisions in England and Wales (*n*): and as to management, it is subject to such regulations as in the acts contained: and to such as shall be made from time to time by

(*i*) 5 & 6 Will. 4, c. 38, s. 7.

(*k*) As to the confinement of debtors in the common county gaol, if certified by an inspector of prisons to be adapted for that class of prisoners, see 17 & 18 Vict. c. 115.

(*l*) 5 & 6 Vict. c. 22. As to Admiralty prisoners under sentence of courts-martial, see 5 & 6 Vict. c. 98, s. 27.

(*m*) See Wade *v.* Wood, 1 C. B. 463.

(*n*) 55 Geo. 3, c. 50; 5 & 6 Vict. c. 22.

one of her majesty's principal secretaries of state, and afterwards laid before parliament (*o*).

2. The *Millbank Prison* (*p*) (formerly called the Penitentiary at Millbank): for the reception of convicts under sentence or order of penal servitude until otherwise disposed of (*q*). The justices of the peace have no authority over this prison (*r*); but it is placed, under a board of three persons, to be appointed by a principal secretary of state, as Directors of the prisons of Parkhurst, Pentonville, Millbank, and of the places for confinement of male offenders in England under sentence of penal servitude,—and to be a body corporate, by the name of "The Directors of Convict Prisons (*s*)." These Directors are to make regulations for the government of the Millbank prison, subject to the approbation of a principal secretary of state, and to make yearly reports to such secretary, as to all matters relating to the prison or the convicts; which reports are to be afterwards laid before both houses of parliament (*t*). A principal secretary of state is also to appoint for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as may be deemed necessary (*u*).

3. The *Parkhurst Prison;* established in the Isle of Wight, for the confinement and correction of young offenders, male or female, as well those under sentence of penal servitude, as those under sentence of imprisonment (*x*). The rules for this prison are to be made by one of the principal secretaries of state, and afterwards laid before

(*o*) 5 & 6 Vict. c. 22.

(*p*) 6 & 7 Vict. c. 26, repealing the former acts relating to the Penitentiary, amended by 11 & 12 Vict. c. 104. Et vide 5 & 6 Vict. c. 98, s. 26; 11 & 12 Vict. c. 104; 13 & 14 Vict. c. 39.

(*q*) By 6 & 7 Vict. c. 26, ss. 12, 14, persons sentenced to transportation were formerly confined in this prison until they were sent out of the country: by 16 & 17 Vict. c. 99, s. 6, and 20 & 21 Vict. c. 3, s. 3, this place of confinement will now be applicable to persons sentenced to *penal servitude.*

(*r*) Sect. 8.

(*s*) 13 & 14 Vict. c. 39; 20 & 21 Vict. c. 3, s. 3.

(*t*) Sects. 10, 11. Et vide 13 & 14 Vict. c. 39, s. 1.

(*u*) 6 & 7 Vict. c. 26, s. 5.

(*x*) 1 & 2 Vict. c. 82. See 5 & 6 Vict. c. 98, s. 12; 20 & 21 Vict. c. 3, s. 3.

parliament; and they may include the infliction of corporal punishment on all such offenders. By the same authority a governor, chaplain, surgeon, and matron, and all other necessary officers, are to be appointed. This establishment is moreover placed, by 13 & 14 Vict. c. 39, under the superintendence of the "Directors of Convict Prisons" (*y*); who, if they discover any abuses, are to report the same to a principal secretary of state; and shall also make a half-yearly report as to its state and condition.

4. The *Pentonville Prison;* also established for the confinement of male convicts under sentence or order of penal servitude until otherwise disposed of (*z*). It is placed, by 13 & 14 Vict. c. 39, under the superintendence of the same authority as the prisons of Millbank and Parkhurst, viz. "The Directors of Convict Prisons" (*a*); and power is conferred on them to hold meetings and make rules, subject to the approbation of a principal secretary of state (*b*); and, with the like approbation, to appoint officers,—consisting of a governor, a chaplain, a medical officer, and such others as may be found necessary (*c*). And it is provided, that the Directors shall from time to time appoint one or more of themselves to visit the prison during the intervals between their meetings; and, if they think fit, may delegate power to such visitors, to make orders in cases of pressing emergency (*d*). And further, that the Directors shall annually make reports to the secretary of state as to all matters relating to the prison, its discipline and management: which reports shall afterwards be laid before both houses of parliament (*e*).

(*y*) Vide sup. p. 230.

(*z*) By 5 & 6 Vict. c. 29, ss. 14, 16, this prison was appropriated to male convicts, sentenced or ordered to be transported, till they were sent out of the country: by 16 & 17 Vict. c. 99, s. 6, and 20 & 21 Vict. c. 3, s. 3, this place of confinement will now be applicable to persons sentenced to *penal servitude.*

(*a*) 5 & 6 Vict. c. 29, s. 11. Et vide 13 & 14 Vict. c. 39.

(*b*) 5 & 6 Vict. c. 29, s. 9.

(*c*) Sect. 6.

(*d*) Sect. 10.

(*e*) Sect. 13.

CHAPTER VII.

OF THE LAWS RELATING TO HIGHWAYS.

HIGHWAYS (or public roads) are those ways which all the subjects of the realm have a right to use; and the term, (for some purposes at least,) also applies to ways common to the inhabitants of some particular parish or district only,—as in the case of church paths (*a*). The roads now in use have generally either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local acts of parliament. They may be traced, however, in some cases, to a different origin; for the owner of any land may, if he think fit, dedicate a way over it to the use of the public; and if he long permit strangers to pass over it, at their free will and pleasure, and without molestation, a dedication of this kind will be presumed (*b*).

The liability to keep highways in repair, (in whatever manner they may happen to have first originated,) is of common right incumbent in general upon the parishes in which they respectively lie; but in some cases it attaches (by prescription) to particular townships (*c*), or other divisions of parishes; and occasionally to private individuals, bound *ratione tenuræ*, or in right of their estates, to repair some

(*a*) See the Highway Act, 5 & 6 Will. 4, c. 50, s. 5. A highway may exist in a place which is not a thoroughfare. (Bateman *v.* Bluck, 18 Q. B. 870.)

(*b*) As to highways by dedication, vide Barraclough *v.* Johnson, 8 A. & E. 99; Surrey Canal Company *v.* Hall, 1 Man. & G. 392; Poole *v.* Huskinson, 11 Mee. & W. 827; Roberts *v.* Hunt, 15 Q. B. 17; The Queen *v.* Petrie, 4 Ell. & Bl. 737.

(*c*) See Queen *v.* Inhabitants of Lordsmere, 15 Q. B. 689.

particular highway (*d*). Where an individual is liable to repair, he often claims (by grant or prescription) a toll of that species which is called a *toll thorough*, or (where the soil is his), a *toll traverse* (*e*). The case of bridges is differently provided for. The expense of maintaining these is defrayed indeed (like that of roads) by the public;—this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio* (*f*);—but it is incumbent, not on the parishes, but, as the general rule, on the counties at large in which the bridges are situate (*g*). And where a parish is bound by prescription, (as is sometimes the case,) to repair a bridge, there is a statutory provision, which gives effect to any contract between the county and the parish, for performing the repairs in future at the expense of the former, and relieving the latter from the charge (*h*). The liability of the county extended at common law, not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches,—and by stat. 22 Hen. VIII. c. 5, the county was bound to repair three hundred feet either way from the bridge. And such is still the state of the law as to all bridges built prior to the passing of the Highway Act, 5 & 6 Will. IV. c. 50. But by that act (*i*) it is provided,

(*d*) 3 Geo. 4, c. 126, s. 107; 5 & 6 Will. 4, c. 50, s. 62. See R. *v.* Eastrington, 5 A. & E. 765; R. *v.* Heage, 1 Q. B. 128.

(*e*) Com. Dig. Toll; Willes, 115. See Brett *v.* Beales, 10 B. & C. 508; Lord Middleton *v.* Lambert, 1 A. & E. 401; R. *v.* Marquis of Salisbury, 8 A. & E. 716.

(*f*) 1 Bl. Com. 357. An individual may be liable to repair a bridge *ratione tenuræ*; see Baker *v.* Greenhill, 3 Q. B. 148; Queen *v.* Bedfordshire (Inhabitants), 4 Ell. & Bl. 535.

(*g*) Viner's Abridg. Bridges (A). As to borrowing money on credit of the county rate, for repair of the bridges therein, see 4 & 5 Vict. c. 49. As to the manner of providing for the repair of bridges, in cases where the *borough* and not the county is liable, see 13 & 14 Vict. c. 64.

(*h*) 22 Hen. 8, c. 5. (See R. *v.* Hendon, 4 B. & Ad. 628.)

(*i*) 5 & 6 Will. 4, c. 50, s. 21.

that in the case of all bridges thereafter to be built, the repair of the road itself passing over or adjoining to a bridge shall be done by the parish, or other parties bound to the general repair of the highway of which it forms a portion;—the county being still subject, however, to its former obligation, as regards "the walls, banks, or fences "of the raised causeways, and raised approaches to any "bridge, or the land arches thereof."

The same act (*j*) contains provisions, designed to protect parishes from being subjected to unreasonable charge, in respect of ways dedicated to the public. It enacts, that no road made at the expense of any individual, or body corporate, shall be deemed a highway which the parish is liable to repair, unless three calendar months' notice shall be given to the parish surveyor, of an intention to dedicate such road to the public (*k*). Upon notice being so given, a vestry is to be called to consider whether the road is of sufficient utility to justify its being kept in repair by the parish; and in the event of the vestry holding the negative, the justices, at the next special sessions for the highways, are to determine the matter. Other provisions are added, the object of which is to ensure that the road shall be originally constructed in a proper and substantial manner, before the expense of repairing it is cast upon the parish.

Any parish, county, or other party bound to repair a road or bridge, and neglecting the duty, is liable at common law to an indictment (*l*).

Though the maintenance of all the highways in the kingdom is legally chargeable, either upon the parishes through

(*j*) Sect. 23.

(*k*) As to the liability of the parish before this statute, see R. v. Leake, 5 B. & Ad. 469.

(*l*) As to the costs of this indictment, see Reg. v. Inhabitants of Heanor, 6 Q. B. 745; R. v. Inhabitants of Vowchurch, 2 Car. & Kir. 393; R. v. Inhabitants of Watford, 2 N. M. C. 162; The Queen v. Eyton, 3 Ell. & Bl. 390: and as to its removal by *certiorari*, R. v. Inhabitants of Sandon, 3 Ell. & Bl. 390.

which they respectively pass, or on some particular district or individual,—the expense of the most frequented and important roads is nevertheless chiefly defrayed by other means. These are kept in order, (and many of them were originally constructed,) under the authority of local acts of parliament, called *Turnpike Acts:* by which the management of such roads is usually vested, for a certain term of years, in trustees or commissioners; who are empowered to erect toll-gates, and to levy tolls from passengers, as a fund for defraying the expense of repairs or improvements. There is thus a distinction between *highways in general*, and *turnpike roads*. It is to be understood, however, with respect to the latter, that the collection of toll does not supersede the other means provided by law for maintaining highways. If a turnpike road or bridge is allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to make it good (supposing it not to have become the subject of a turnpike trust) are still, in general, liable to that obligation (*m*). But they may be exempt from it under particular circumstances; for the trustees of a turnpike road may, in certain cases, enter into contract with such parties, and undertake to repair exclusively out of the trust (*n*); and where any contract of this description is in force, the persons originally liable are of course discharged from all responsibility. The turnpike trusts are very numerous; but there is one, which, from its importance, deserves a specific notice. It is that of the "turnpike roads of the metropolis, north of the Thames;" the different trusts of which were consolidated into one by 7 Geo. IV. c. cxlii., amended by 10 Geo. IV. c. 59.

With respect to those highways, or parts of highways, which pass through and form the streets of towns, we may observe that they are generally the subject of dis-

(*m*) 7 & 8 Geo. 4, c. 24, s. 17; 3 Geo. 4, c. 126, s. 110; 4 & 5 Vict. c. 59; see R. *v.* Netherthong, 2 B. & A. 179; Bussey *v.* Storey, 4 Bl. & Adol. 109.

(*n*) 3 Geo. 4, c. 126, ss. 106, 107, 108.

tinct provision, under acts of parliament of another kind, usually called *Paving Acts* (*n*). In 10 & 11 Vict. c. 34, a consolidation will be found of the provisions ordinarily introduced into acts of this description.

Having thus taken some view of the general state of the law relative to public roads or highways, we propose now to take some short notice of the particular practical provisions applicable to the several classes.—I. Of highways in general. II. Of turnpike roads.

I. *Highways in general.*—These are regulated by the Highway Act, 5 & 6 Will. IV. c. 50, (amended by 4 & 5 Vict. cc. 51, 59, and 8 & 9 Vict. c. 71,) which has repealed all former enactments on the subject (*o*); and is applicable to all highways whatever—except turnpike roads, and roads pavements or bridges falling under the provisions of local or personal acts of parliament (*p*).

The general plan of the act is, to place highways under the care of surveyors, to be appointed for the respective parishes, (subject to a superintending power to be exercised, in certain cases, by the justices of the peace,) at special sessions to be holden for the highways; and to provide for the expenses connected with this subject by a rate on the occupiers of land, to be made and levied by the surveyor, upon the same principle (generally) as the poor rate (*q*). A surveyor of the highways is to

(*n*) As to the Acts for paving, lighting, &c. in boroughs, see 20 & 21 Vict. c. 50, ss. 2—4.

(*o*) 5 & 6 Will. 4, c. 50, s. 1. See R. v. Mawgan, 8 A. & E. 496.

(*p*) The highways of *South Wales* are especially regulated by 14 & 15 Vict. c. 16 (amended by 17 & 18 Vict. c. 7); but, in all points not otherwise provided for by those acts, are within the 5 & 6 Will. 4, c. 50.

(*q*) 5 & 6 Will. 4, c. 50, ss. 27, 113. (See Reg. v. Randall, 4 Ell. & Bl. 564.) As to the recovery of the costs of distraining for highway rates, and the course of proceeding on such distress, see 12 & 13 Vict. c. 14. As to the power of vestries to order that the *owner*, instead of the *occupier*, shall be assessed to highway rate, in the case of tenements not exceeding 6*l*. per annum in rateable yearly value, see 13 & 14 Vict. c. 99. (Et vide 14 & 15 Vict. c. 39.) As to the application of highway rates to the

be elected annually, by the inhabitants in vestry assembled (*r*); and is to possess certain qualifications in point of property. When elected, he is compellable—unless he can show some grounds of exemption (*s*)—to take upon himself the office; but he is permitted to appoint a deputy, who is subject to the same responsibilities with his principal (*t*). The vestry may appoint a surveyor if they think proper, with a salary (*u*). Any two or more parishes may,—by mutual agreement and by consent of the justices of the peace at special sessions, or at quarter sessions (according to circumstances),—be united into one district, for the purposes of the act, under the superintendence of a *district surveyor* (*x*). This officer, however, is to have no authority to make or levy the rate; but each parish must elect its own separate surveyor for that purpose (*y*). On the other hand, in large parishes, the duties of the office of surveyor may be committed to more than one person. For where a parish has a population of more than five thousand, a board of surveyors may be appointed, to be called the "Board for repair of the highways" in that parish; and they are authorized to appoint collectors, an assistant surveyor, a clerk, and a treasurer (*z*).

The principal duty of the surveyor is to keep the parish highways in repair (*a*). Where any of them is out of order, complaint may be made to any justice of the peace, on the

repair of turnpike roads, see 2 & 3 Vict. c. 84; 3 & 4 Vict. c. 98; 4 & 5 Vict. c. 59; 17 & 18 Vict. c. 52; R. v. Berks Js., 8 Dowl. P. C. 727; R. v. Derbyshire Js., 7 Q. B. 193; R. v. Preston, 12 Q. B. 816; R. v. Trustees of South Shields Roads, 3 Ell. & Bl. 599; R. v. Worthing Road Trustees, ib. 989.

(*r*) 5 & 6 Will. 4, c. 50, s. 6. As to the election and appointment of surveyor, see R. v. Best, 2 N. S. C. 655; Reg. v. Justices of Surrey, 5 D. & L. 40.

(*s*) The same grounds of exemption that apply to an overseer of the poor, hold also as to a surveyor of the roads. Vide sup. p. 161, n. (*d*).

(*t*) 5 & 6 Will. 4, c. 50, ss. 7, 8.

(*u*) Sect. 9.

(*x*) Sects. 13—15; R. v. King's Newton, 1 B. & Adol. 826.

(*y*) 5 & 6 Will. 4, c. 50, ss. 16, 17; R. v. Bush, 9 Ad. & E. 820.

(*z*) 5 & 6 Will. 4, c. 50, s. 18.

(*a*) Sect. 6.

oath of one witness, and that magistrate may grant a summons thereon: but the charge is to be heard before the justices at special sessions for the highways; and if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose,—find that the highway is not in thorough and effectual repair, they may convict the surveyor in a penalty not exceeding *5l.*, and order him to repair within a limited time. If the order is not complied with, he incurs the further forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required; and the money is to be applied accordingly to that purpose (*b*). The same course of proceeding, *mutatis mutandis*, is applicable to the case where a body corporate or private person is chargeable *ratione tenuræ*,—and if the highway is part of a turnpike road, the justices are to summon the treasurer, surveyor or other officer of the trust, and to make such order upon him as is already stated with regard to the parish surveyor (*c*). They have however no power to make an order, in any case where the obligation of repairing comes into question (*d*). The only remedy, where that occurs, is by indictment; which is to be preferred by order of the justices against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*e*).

Any injury whatever done to a highway, by which it is rendered less commodious to the passengers, is a public nuisance, and an indictable offence at common law; and any person is at liberty to abate the nuisance by removing the materials (*f*). But by the Highway Act, the surveyor is specially required to remove all obstructions on the highways, and to impound cattle found straying thereon (*g*);

(*b*) 5 & 6 Will. 4, c. 50, s. 94.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Sect. 95.

(*f*) 1 Hawk. P. C. c. 76, ss. 48, 61; Marriott *v.* Stanley, 1 M. & Gr. 568; Brook *v.* Jenney, 1 Gale & D. 567.

(*g*) 5 & 6 Will. 4, c. 50, ss. 64—69, &c. See Keane *v.* Reynolds, 2 Ell. & Bl. 748.

and the act provides that any person or persons committing such particular nuisances as it enumerates in highways,—or (in general) doing injury to the same, or obstructing the free passage thereof,—shall incur a forfeiture not exceeding 40*s*. (*h*).

By the common law, the course of an antient highway could not be changed without the king's licence, to be obtained after suing out a writ of *ad quod damnum*, and the finding of an inquisition thereon, that the alteration would not be prejudicial to the public (*i*). But by the Highway Act any two justices of the division may (subject to certain conditions and restrictions) order highways to be widened or enlarged (*k*). The inhabitants in vestry assembled may also direct the surveyor to apply to two justices of the division, to examine a highway with a view to its being diverted or stopped up; and if a certificate of the justices in favour of such proceeding is sent to the quarter sessions, the justices there assembled are to make the order accordingly (*l*). But, in case of a diversion, the proceeding must be by consent of the owner of the lands through which the new highway is to pass (*m*). And in either case, any person who may think himself aggrieved by the proceeding, may appeal from the certificate of the justices to the quarter sessions, before the order of that court is made (*n*); and the propriety of the stoppage or diversion is then to be determined by a jury (*o*).

II. *Turnpike roads* (*p*).—These do not in general fall within the operation of the Highway Act (*q*); but are regu-

(*h*) 5 & 6 Will. 4, c. 50, ss. 72, 74.

(*i*) 1 Hawk. P. C. c. 76, s. 3; Fowler *v.* Sanders, Cr. Jac. 446.

(*k*) 5 & 6 Will. 4, c. 50, s. 82.

(*l*) Sects. 84, 91.

(*m*) Sect. 85; see The Queen *v.* Justices of Worcestershire, 3 Ell. & Bl. 477.

(*n*) Sect. 88; see Selwood *v.* Mount, 1 Q. B. 726.

(*o*) Sect. 89.

(*p*) As to the legal meaning of the words "turnpike road," see Northam Bridge and Road Company *v.* London and Southampton Railway Company, 6 Mee. & W. 428.

(*q*) 5 & 6 Will. 4, c. 50, s. 113.

lated, primarily, by the local acts relative to each particular road,—which (though temporary) are continued by the legislature from time to time as they are about to expire (*r*);—and, in the next place, by statutes of a general description, applicable (with very few exceptions) to all turnpike roads (*s*),—that is, all roads maintained by tolls and placed under the management of trustees or commissioners for a limited period of time (*t*). Of these general turnpike acts (which are numerous (*u*)), the 3 Geo. IV. c. 126, is the principal.

The general effect of their leading provisions is as follows:—

Every trustee or commissioner of a turnpike road must possess a certain qualification in point of property (*x*)—must be sworn to the due execution of his duties (*y*); and is prohibited from holding any profitable office or contract, under the act of which he is trustee (*z*). The justices of the peace of the different counties or divisions through which the road passes are, *ex officio*, commissioners of the trust (*a*).

The trustees are not only to maintain and keep in repair roads committed to their management; but to construct and maintain causeways at the sides of them for the use of foot passengers (*b*); to place milestones (*c*); and to widen, divert, or improve the roads as they shall think proper: and, for the latter purpose, they are empowered to purchase

(*r*) See the last of these acts for continuance, 20 & 21 Vict. c. 24.

(*s*) See 3 Geo. 4, c. 126, s. 4; 9 Geo. 4, c. 77, s. 20; 1 & 2 Will. 4, c. 25, s. 4; 4 Geo. 4, c. 95, s. 88; 9 Geo. 4, c. 77, s. 19.

(*t*) See 4 Geo. 4, c. 95, s. 90; 3 Chitty's Burn, 177.

(*u*) See 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; 7 & 8 Geo. 4, c. 24; 9 Geo. 4, c. 77, s. 19; 1 & 2 Will. 4, c. 25; 2 & 3 Will. 4, c. 124; 3 & 4 Will. 4, c. 80; 4 & 5 Will. 4, c. 81; 4 & 5 Vict. cc. 33, 51. See as to the turnpike roads in *South Wales*, 7 & 8 Vict. c. 91; 8 & 9 Vict. c. 61; and 10 & 11 Vict. c. 72.

(*x*) 3 Geo. 4, c. 126, s. 62.

(*y*) 4 Geo. 4, c. 95, s. 32.

(*z*) 3 Geo. 4, c. 126, s. 65.

(*a*) 3 Geo. 4, c. 126, s. 61.

(*b*) Ibid. ss. 111, 112. See Loveridge *v.* Hodsoll, 2 B. & Ad. 602; R. *v.* Higgins, 5 B. & Adol. 555.

(*c*) 3 Geo. 4, c. 126, s. 119.

land; and, (subject to certain conditions and restrictions,) to turn the road over the property of individuals (*d*), and to take materials from the lands of private owners (*e*). To facilitate the performance of the duty relative to repairs, they are also empowered, (if they think proper,) to contract, by the year or otherwise, with any person for repairing or amending the road, or any bridges or buildings thereon (*f*).

The trustees are also bound to prevent or remove all nuisances and annoyances on the roads under their management; and they are to direct prosecutions for these offences, or any other offence, committed on the same (*g*).

To meet the expenses incurred, the trustees are to erect toll gates (*h*); and the tolls are to be taken every day,—the computation of them being from twelve at night to twelve the night following (*i*). They are to put up at every toll gate a table of tolls, and to provide toll tickets to acknowledge the receipt (*k*). No person, unless exempted, is to pass without paying (*l*): and if a passenger liable to pay refuses, the collector may seize and distrain the beast or carriage, or any of the goods and chattels of the passenger; and, in default of payment for four days, may sell the distress (*m*). If any dispute arises about the amount of the toll due, or the charges of a distress, it may be settled by any justice of the peace acting for the place where the toll gate is situate (*n*). Of the various cases of exemption from tolls, we shall only notice the following:—No toll is taken on horses or carriages in

(*d*) 9 Geo. 4, c. 77, s. 9; 4 Geo. 4, c. 95, s. 65; 3 Geo. 4, c. 126, s. 84.

(*e*) 3 Geo. 4, c. 126, s. 97.

(*f*) 4 Geo. 4, c. 95, s. 78.

(*g*) 3 Geo. 4, c. 126, s. 133.

(*h*) 9 Geo. 4, c. 77, s. 5.

(*i*) Ibid. s. 16.

(*k*) 3 Geo. 4, c. 126, s. 37; 4 Geo. 4, c. 95, s. 28.

(*l*) As to 3 Geo. 4, c. 126, ss. 41, 139, see R. *v.* Irving, 12 Q. B. 429.

(*m*) 3 Geo. 4, c. 126, s. 39.

(*n*) Ibid. s. 40. As to toll collectors, and the mode of proceeding against them in case of misconduct, vide ibid. s. 52; 4 Geo. 4, c. 95, ss. 30, 50; R. *v.* Hants (Justices), 1 B. & Adol. 84, 654.

attendance on her Majesty, or on any of the royal family, or returning therefrom (*o*): nor upon horses of officers or soldiers on duty (*p*), or being in uniform (*q*); nor on carriages employed in (or returning from) the conveyance of materials for turnpike roads or highways, nor (in general) on those employed in the conveyance of manure, or of implements of husbandry (*r*), or of produce grown on the land of the owner, and not sold or going to be sold (*s*). An exemption is also allowed, (where the turnpike gate in question is not within five miles of the Royal Exchange or Westminster Hall,) to any person going to or returning from his proper parochial church or chapel,—or his usual place of religious worship tolerated by law,—on Sundays, or any day on which divine service is by authority ordered to be celebrated (*t*). Parishioners also are exempted in attending or returning from the funeral of persons, who die and are buried in the parish in which the turnpike road lies; as also are rectors, vicars, or curates, going or returning from their parochial duties; and persons going to, or returning from, the election of a member for the county in which the road is situated: and horses or other cattle, and vehicles of all descriptions, are also exempted which only cross the road, or do not pass above a hundred yards thereon (*u*). It is to be observed, however, that any person claiming or taking an exemption, by fraudulent means, is liable to be convicted in a penalty not exceeding 5*l.* (*x*).

(*o*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 4, c. 95, s. 24.

(*p*) As to the exemption of police and other officers, see 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1; 14 & 15 Vict. c. 38, s. 4.

(*q*) 8 Vict. c. 9, s. 55.

(*r*) As to what these words include, see 14 & 15 Vict. c. 38, s. 4. By 13 & 14 Vict. c. 79, s. 3, the trustees may, with approval of a principal secretary of state, reduce or take off the tolls on beasts or carriages used in conveying lime for the improvement of land.

(*s*) 3 Geo. 4, c. 126, s. 32; 5 & 6 Will. 4, c. 18; 3 & 4 Vict. c. 51; 14 & 15 Vict. c. 38, s. 4; see R. v. Adams, 6 M. & S. 52.

(*t*) 3 Geo. 4, c. 126, ss. 32, 33; see Lewis v. Hammond, 2 B. & A. 206.

(*u*) 3 Geo. 4, c. 126, s. 32; 3 & 4 Vict. c. 33; see Harris v. Morrice, 10 Mee. & W. 260.

(*x*) 3 & 4 Vict. c. 33, s. 36.

The trustees are empowered, on obtaining the previous consent in writing of a secretary of state, to borrow money, as they may think proper, on the credit of the tolls; and may mortgage them, by way of security, to the lenders (*y*). They may also let them to farm for three years at a time (*z*), subject to such regulations as the acts prescribe—may compound for them with any person or persons for a year at a time—may reduce them (by consent of creditors)—or may advance them to the full amount authorized by the particular act (*a*).

(*y*) 3 & 4 Vict. c. 33, s. 81. See 12 & 13 Vict. c. 87; 13 & 14 Vict. c. 79; 17 & 18 Vict. c. 58, for provisions with respect to mortgages of turnpike tolls; and 14 & 15 Vict. c. 38; 15 & 16 Vict. c. 33; 17 & 18 Vict. c. 51; 18 & 19 Vict. c. 102; 19 & 20 Vict. c. 12; 20 & 21 Vict. c. 9, as to arrangements for relief of insolvent turnpike trusts.

(*z*) 3 & 4 Vict. c. 33, s. 55.

(*a*) 4 Geo. 4, c. 95, s. 13; 3 Geo. 4, c. 126, s. 43; see R. *v.* Trustees of Bury and Stratton Roads, 4 B. & C. 361.

CHAPTER VIII.

OF THE LAWS RELATING TO NAVIGATION,—AND TO THE MERCANTILE MARINE.



In attempting to exhibit, in a condensed form, the principal laws relating to the extensive subject indicated in the title to this chapter, we shall distribute our statement under the following heads:—

I. The laws relating to navigation.

II. The laws relating to the ownership, registration, and transfer of merchant ships.

III. The laws relating to merchant seamen.

IV. The laws relating to pilotage.

V. The laws relating to lighthouses, beacons, and sea marks.

VI. The laws relating to the liability of shipowners, for loss or damage.

VII. The laws relating to fisheries.

I. The laws of navigation, which we shall have occasion to consider, are those which concern the united kingdom and the British possessions in general, in reference to the trading intercourse which foreign countries are allowed to hold with them.

This subject was formerly regulated by the celebrated Navigation Act passed in the reign of Charles the second. Of this act Blackstone observes (*a*), that it was an im-

(*a*) 1 Bl. Com. 418.

provement on our earlier system, which was [framed in 1650 (*b*), and with a narrow partial view; being intended to mortify our own sugar islands, which were disaffected to the Parliament and still held out for Charles the second, by stopping the gainful trade which they carried on with the Dutch (*c*); and at the same time to clip the wings of those our opulent and aspiring neighbours.] This original navigation law [prohibited all ships of foreign nations from trading with any English plantation without licence from the council of state. In 1651, the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture. At the Restoration the former provisions were continued by 12 Car. II. c. 18,] (being the Navigation Act first above referred to,) with the material addition of requiring [that the master and three-fourths of the mariners should also be British subjects,]—the object of this Act, as may be gathered from its preamble, being to encourage by the exclusion of foreign competitors, the ship, seamen, and commerce of Great Britain.

In the reign of King George the fourth (*d*) both this statute and all the other navigation acts then in force were repealed; and a new system of regulations established in their place; and this branch of the law was afterwards amended and consolidated by various acts in the reign of King William the fourth (*e*), and of her present majesty (*f*); but none of these changes involved any departure from the policy of encouraging our mercantile marine and commerce, by prohibitions of such nature in general as above described. More recently, however, under the influence

(*b*) Scobell, 132.

(*c*) Mod. Univ. Hist. xii. 289.

(*d*) See 6 Geo. 4, cc. 109, 110, 114.

(*e*) See 3 & 4 Will. 4, cc. 54, 55, 59.

(*f*) See 8 & 9 Vict. cc. 88, 89, 93.

of the doctrines commonly designated as those of free trade (*g*), a new course of legislation has been pursued continually receding from that policy (*h*), until at length it has been relinquished altogether; except only as regards the trade from one part of any British possession in Asia, Africa and America to another part of the same possession (*i*)—as to which the law still is that it shall not be carried on except in British ships (*k*): though, upon an address from the legislatures of any such possessions praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restriction, her majesty is empowered to authorize it by order in council accordingly, on such terms as she may think fit (*l*). In other respects foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, by some very important provisions tending to confine it to such nations as consent, on the other hand, to

(*g*) As regards the subject now in question, these doctrines are not of merely recent application. It was held by Adam Smith, that the Act of Navigation "was not favourable "to foreign commerce, or the growth "of that opulence which can arise "from it; that a nation will be most "likely to buy cheap, when by the "most perfect freedom of trade it "encourages all nations to bring to "it the goods which it has occasion "to purchase; and for the same rea-"son it will be most likely to sell "dear, when its markets are thus "filled with the greatest number of "buyers." He remarks, however, that "the defence of Great Britain "depends very much upon the num-"ber of its sailors and shipping;" and concludes that, "as defence is "of much more importance than "opulence, the Act of Navigation "is perhaps the wisest of all the "commercial regulations of Eng-"land." (Wealth of Nations, vol. 2, p. 194.)

(*h*) This commenced with the statute 12 & 13 Vict. c. 29, which repealed 8 & 9 Vict. c. 88, and has since been itself repealed by 17 & 18 Vict. c. 120.

(*i*) Of the other restrictions formerly existing, those which were longest retained were such as related to the coasting trade of the United Kingdom and the Channel Islands. (See 12 & 13 Vict. c. 29; 17 & 18 Vict. c. 5; 18 & 19 Vict. c. 96, ss. 13, 14.)

(*k*) See 16 & 17 Vict. c. 107, s. 163.

(*l*) Ibid. s. 328.

concede to us a reciprocal and equal freedom. For by 16 & 17 Vict. c. 107, ss. 324—326 (*m*), and by 18 & 19 Vict. c. 96, s. 15 (*n*), it is enacted, that if it shall be made appear to her majesty, that British vessels are subject in any foreign country to any *prohibitions* or *restrictions* as to the voyages in which they may engage, or the articles which they may import or export, her majesty may, by order in council, impose such prohibitions and restrictions upon the ships of such country in reference to the same subject, as she may think fit,—so as to place such ships as nearly as possible on the same footing as that on which British ships are placed in the ports of the country to which the former ships belong:—and further, that if it shall appear to her majesty that British ships are directly or indirectly subject in any foreign country to *duties or charges* from which the national vessels of such country are exempt; or that any duties are imposed there upon articles imported or exported in British ships, which are not equally imposed upon the like articles in national vessels; or that *any preference whatsoever is shown*, either directly or indirectly, to national vessels over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter; or that British trade and navigation are not placed by such country on *as advantageous a footing as the trade and navigation of the most favoured nation*;—her majesty may in such case, by order in council, impose such duty or duties of tonnage upon the ships of such nation, or such duty or duties on goods imported or exported in its ships, as may appear to her justly to countervail the disadvantages to which British trade or navigation is so subjected (*o*).

Such, in a summary point of view, is the effect of those laws of navigation of which we propose to treat.

(*m*) Called "The Customs Consolidation Act, 1853."

(*n*) Called "The Supplemental Customs Consolidation Act, 1855."

(*o*) See also 15 & 16 Vict. c. 47, An Act to enable her Majesty to abolish otherwise than by treaty, on condition of reciprocity, differential duties on foreign Ships.

There are legislative provisions also, of a special kind with respect to the trade with any British possessions on or near the Continent of Europe, or in Africa, or within the Mediterranean Sea; and with respect to the trade with India and China, and the coasting trade of India. But any detail of them would carry us beyond the limits which it is necessary to observe in the present chapter. It must suffice to refer the reader to 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 6 & 7 Vict. c. 80; 16 & 17 Vict. c. 107, s. 327; 17 & 18 Vict. c. 104, s. 108.

As to the five next of the heads enumerated at the outset of this chapter, the laws relating to them have lately been thrown into one Act, viz., the 17 & 18 Vict. c. 104, called "The Merchant Shipping Act, 1854" (*p*); and the account therefore which we shall have to give of the law under these heads will be in the way of abstract from that Act, as amended in some respects by a subsequent Act of 18 & 19 Vict. c. 91.

With regard to the whole of the subjects collectively, which are embraced under these five heads, we may make the preliminary remark, that they are all placed under the general superintendence of that committee of the privy council which is commonly described as the Board of Trade (*q*). But it will be necessary to treat of those subjects severally and successively, in such general and summary manner at least as is suitable to the plan and nature of the present work. We proceed then to consider—

II. The laws relating to the ownership, registration and transfer of merchant ships (*r*).

(*p*) This act, consisting of 548 sections, embraces the subjects of shipping, masters and seamen, safety and prevention of accidents, pilotage, lighthouses, wrecks and salvage, liability of ship-holders, legal procedure.

(*q*) 17 & 18 Vict. c. 104, s. 6. This act defines the Board of Trade as "The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade of foreign plantations" (sect. 2).

(*r*) These apply to the whole of her majesty's dominions (17 & 18 Vict. c. 104, s. 17). But nothing in

And here the Merchant Shipping Act, 1854, provides, that no ship (*s*) shall be deemed a British ship unless she belong wholly to owners who are of one of the following descriptions:—Natural-born subjects—persons made denizens, or persons naturalized, either by or pursuant to any act of parliament or the proper legislative authority in some British possession—or bodies corporate established under, subject to the laws of, and having their principal place of business in the united kingdom or some British possession (*t*). And even as to the capacity of the three first descriptions of persons to be owners, some restrictive conditions are contained in the Act (*u*). It is also provided that every British ship (subject to some few exceptions (*v*)) must be *registered;* and

that Act is to affect the Act 3 & 4 Vict. c. 56, as to the trade of ships built and trading within the limits of the charter of the East India Company (sect. 108).

(*s*) By 17 & 18 Vict. c. 104, s. 2, "ship" is defined for the purposes of the Act, as every description of vessel used in navigation, not propelled by oars.

(*t*) 17 & 18 Vict. c. 104, s. 18.

(*u*) As to natural-born subjects, it is provided, by 17 & 18 Vict. c. 104, s. 18, that none can be an owner who has taken the oath of allegiance to any foreign sovereign or state, unless he has subsequently taken the oath of allegiance to her majesty, and is and continues during the whole of his ownership resident within her majesty's dominions, or if not so resident, then a member of a British factory or partner in a house actually carrying on business within her majesty's dominions. As to persons made denizens or naturalized, it is made a condition that such persons are and continue during the whole of their ownership resident within her majesty's dominions, or if not so resident, then members of a British factory or partners in a house actually carrying on business within those dominions, and have taken the oath of allegiance to her majesty subsequently to their being made denizens or naturalized.

(*v*) 17 & 18 Vict. c. 104, s. 19. The exceptions are—1. Ships registered prior to the Act. 2. Ships not exceeding fifteen tons burthen employed solely on the rivers or coasts of the united kingdom, or of some British possession within which the managing owners reside. 3. Ships not exceeding thirty tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent or in the Gulf of St. Lawrence, or such portion of the coast of Canada, Nova Scotia, or New Brunswick, as lie bordering on such gulf.

that unless registered she shall not be recognized as a British ship so as to be entitled to any of the advantages or protection usually enjoyed by British ships, or to use the national flag or assume the national character (*w*). This registration may be made in the united kingdom at any port approved by the commissioners of customs for the registry of ships; and is to be made with the collector or comptroller, or other principal officer of customs, who is to be deemed registrar for the purposes of this act (*x*): and the port at which any ship is registered is thereafter to be considered as that to which she belongs; until the registry is transferred (as it may be) to another (*y*). It is further provided, with respect to the registration, that it must comprise, *inter alia*, the name of the ship, which is incapable of being afterwards changed (*z*); and the names and descriptions of the owners (*a*). But in connection with this registration of the owners the following points require attention:—1. The property in any ship is always to be divided for this purpose into sixty-four shares (*b*). 2. No person is to be registered as owner of any fractional part of a share (*c*). 3. The individuals registered as owners are not to exceed thirty-two in the whole, except that any number not exceeding five may be registered as joint owners of any share (*d*). 4. The property in the ship or its shares, so far as regards the power of making a valid title as owner to a purchaser, is vested exclusively in the registered owners (*e*); though any number of other persons may be *beneficially* or *equitably* interested, and may enforce their rights in that capacity, in case of breach of trust, by application to the Court of Chancery (*f*).—Again, the act provides, that a registered ship, or any share therein, when

(*w*) 17 & 18 Vict. c. 104, ss. 19, 106.

(*x*) Sect. 30.

(*y*) Sects. 33, 89. 18 & 19 Vict. c. 91, s. 12.

(*z*) 17 & 18 Vict. c. 104, s. 34.

(*a*) Sect. 42.

(*b*) Sect. 37.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Sect. 43.

(*f*) Sects. 37, 65.

disposed of to a person qualified to be owner of a British ship (*g*), shall be *transferred* by a bill of sale under seal, according to a form prescribed (*h*); upon which the name of the transferree shall be entered on the register book (*i*): and also that a registered ship or any share therein may be *mortgaged* by instrument in a form prescribed for that purpose (*k*), and the mortgage shall be entered in the register book (*l*); and it is *inter alia* enacted, that where there are several mortgagees, their respective priorities are to be in all cases according to the time at which each security was registered, and not the time at which it was executed (*m*).

III. The laws relating to merchant seamen.

These have chiefly in view the great national object of promoting the increase of our mercantile mariners, of securing their efficiency and discipline, and of affording them all due encouragement and protection.

The Merchant Shipping Act, 1854, provides that local marine boards shall be established at certain of the sea ports of the united kingdom, for carrying into effect the provisions of that act, under the superintendence of the Board of Trade (*n*): and that in every such sea port, the local marine board shall establish a shipping office or offices, under the management of shipping masters (*o*); whose business it shall be to afford facilities for engaging seamen (*p*) by keeping registries of their names and cha-

(*g*) 17 & 18 Vict. c. 104, ss. 55, 56; 18 & 19 Vict. c. 91, s. 11. As to the form of transfer, see Sched. E. of the first act, and see the form issued by the Commissioners of the Customs, in Dowdeswell on the Merchant Shipping Acts, App. 1. The commissioners have power, by consent of the Board of Trade, to alter from time to time the forms in the schedule (17 & 18 Vict. c. 104, s. 96).

(*h*) As to a transfer of a registered ship, to a person *not* qualified to be owner of a British ship, see 17 & 18 Vict. c. 104, s. 53.

(*i*) Sect. 66.

(*k*) Sect. 66. As to the form, see Sched. I., and the form issued by the Commissioners of Customs, Dowdeswell, ubi sup. Appendix, No. 2.

(*l*) Sect. 67.

(*m*) Sect. 69.

(*n*) Sect. 110.

(*o*) Sect. 122.

(*p*) Under this Act, 'seamen'' in-

racters; to superintend and facilitate their engagement and discharge; to provide means for securing the presence on board, at the proper times, of men who are so engaged; to facilitate the making of apprenticeships to the sea service; and generally to perform such other duties relating to merchant seamen and merchant ships as shall be committed to them by the Board of Trade (*q*).

And further that examinations shall be instituted for persons intending to become masters or mates of foreign-going ships, or home trade passenger ships, before examiners appointed by the local marine board (*r*): and that no person shall be employed in a foreign-going ship as master, or as first or second or only mate; or in a home trade passenger ship, as master or first or only mate; unless he possesses a "certificate of competency" as the result of such examination: or (in the case of a person who has attained a certain rank in the service of her majesty or the East India Company), a "certificate of service:" either of which certificates (according to the nature of the case) is to be granted by the Board of Trade to such persons as it finds to be entitled to them (*s*).

In addition to these provisions there are a variety of others, intended for the protection of seamen, and for promoting their health and comfort; from among which we may extract the following.

That the master of every ship (except those of less than eighty tons burthen, exclusively employed in the coasting trade of the united kingdom,) shall enter into an agreement with every seaman whom he carries to sea from any part of the united kingdom, in a form sanctioned by the Board of Trade (*t*), and which shall be signed by the master and each seaman: and shall set forth the nature and duration

cludes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship (sect. 2).

(*q*) Sect. 124.

(*r*) Sect. 131.

(*s*) Sects. 134—140.

(*t*) See the form in Dowdeswell on the Merchant Shipping Acts, App. No. 4.

of the voyage; the number and description of the crew; the time at which each seaman is to be on board, or to begin work; the capacity in which he is to serve; the amount of wages; a scale of provisions; regulations as to conduct; and such punishments for misconduct as the form issued by the Board of Trade shall have sanctioned, and as the parties shall agree to adopt (*u*). That no right to wages shall be dependent on the earning of freight (*v*); and that every stipulation on the part of the seaman for abandoning his right to wages, in the event of the loss of the ship, shall be inoperative (*x*). That every place, occupied by any seaman or apprentice in any ship, shall have such space as in the act particularly specified; shall be kept free from stores or goods of any kind, not being the property of the crew in use during the voyage; and shall be properly caulked and constructed, and well ventilated (*y*). That every ship navigating between the united kingdom and any place out of the same shall be properly supplied with medicines, to be examined by medical inspectors, to be appointed for that purpose (*z*). That "official log-books" shall be kept in every ship (except those employed exclusively in the coasting trade of the united kingdom,) in such form as prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books; and that in all cases entry shall be made in the official log-books as soon as possible after the occurrence to which it relates; and that among the occurrences shall be entered every offence for which punishment is inflicted, every punishment inflicted, and every case of illness, injury or death (*a*).

To secure also the great object of affording general information from time to time, as to the state of our mercantile marine, it is provided that there shall be in the port of London, a "General Register and Record Office

(*u*) 17 & 18 Vict. c. 104, s. 149.

(*v*) Sect. 183. The maxim of law formerly was, that freight was the mother of wages.

(*x*) Sect. 182.

(*y*) Sect. 231.

(*z*) Sects. 224, 226.

(*a*) Sects. 280—282.

for Seamen," under the management of a Registrar-general of Seamen (*b*);—that the master of every foreign-going ship shall, within forty-eight hours after her arrival at her final port of destination in the united kingdom, or upon discharge of the crew, (whichever first happens,) deliver to the shipping master before whom the crew is discharged, a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage; the length and general nature of the voyage or employment; the names, ages and place of birth of the master, the crew, and the apprentice; their qualities on board their last ships or other employment; and the date and places of their joining the ship. And also that the master or owner of every home trade ship shall, every half year, transmit or deliver to some shipping master in the united kingdom, a similar list for the preceding half year: and that all such lists together with other documents in the act particularized, shall be transmitted by the shipping masters by whom they have been received to the Registrar-general of seamen; to be by him recorded and preserved and produced to any person desirous of inspecting the same (*c*). In addition to which the act directs that the collector or comptroller of customs at every port in the united kingdom shall, every half year, transmit to the same officer, a list of all ships registered in such port; and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return (*d*).

IV. The laws relating to pilotage.

The Merchant Shipping Act, 1854 (*e*), recognizes and confirms the powers and jurisdictions theretofore lawfully exercised by various bodies of persons in different parts of the kingdom, as to the appointment and regulation of pilots

(*b*) 17 & 18 Vict. c. 104, s. 271.

(*c*) Sects. 273—277.

(*d*) Sect. 278.

(*e*) Sects. 330—388. The provisions of this act relative to pilotage apply to the united kingdom only (sect. 330).

for those districts respectively (*f*),—the most important of which bodies is the Trinity House of Deptford Strond; a company of masters of ships incorporated in the reign of Henry the eighth, and charged by many successive charters and acts of parliament with numerous duties relating to the marine.

These bodies—which are all referred to by the Act, under the common name of "Pilotage Authorities (*g*)"—it enables, by bye-laws, to be made with consent of her majesty in council, to do various things within their districts respectively; and *inter alia* to determine the qualifications to be required from persons applying to be licensed as pilots, whether in respect of their age, skill, time of service, character, or otherwise; to license such as are qualified; and to make regulations for the government of their pilots (*h*). It also requires these authorities to deliver periodically to the Board of Trade returns comprising a variety of particulars; and among these, all their bye-laws in force for the time being in regard to pilots or pilotage; and the names and ages of all pilots or apprentices acting under their licence or authority; and the service for which each is licensed (*i*): and the returns so made are to be laid by the Board of Trade, without delay, before both houses of parliament (*k*).

It provides also, that every pilotage authority shall have power by bye-law, made with consent of her majesty in council, to exempt the masters of any ships, or of any classes of ships, from being compelled to employ qualified (that is, duly licensed) pilots (*l*); and that the master or mate of any ship may apply to any pilotage authority to be examined as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner, within any part of the district of such

(*f*) 17 & 18 Vict. c. 104, s. 331. See also 16 & 17 Vict. c. 129, ss. 3, et seq.

(*g*) 17 & 18 Vict. c. 104, ss. 2, 331.

(*h*) Sect. 333.

(*i*) Sect. 337.

(*k*) Sect. 339.

(*l*) Sect. 332.

pilotage authority; and if he be found competent, a pilotage certificate shall be granted to enable him to pilot such ships, or any of them, within the limits therein described, without incurring any penalty for the non-employment of a qualified pilot (*m*); but that every master of an *unexempted* ship navigating within any district, who—after a qualified pilot has offered to take charge of her, or has made a signal for that purpose—either himself pilots her without possessing a pilotage certificate enabling him to do so, or employs, or continues to employ, an unqualified person to pilot her; and every master of an *exempted* ship who, under the like circumstances, employs or continues to employ an unqualified person to pilot her; shall, for every such offence, incur a penalty of double the amount of pilotage demandable for the conduct of such ship (*n*).

With regard to the Trinity House in particular, the Act allows it to appoint and license pilots for the limits following, that is to say, 1. "The London District," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south—so nevertheless that no pilot shall be hereafter licensed to conduct ships both above and below Gravesend. 2. "The English Channel District," comprising the seas between Dungeness and the Isle of Wight. 3. "The Trinity House Outport Districts," comprising any pilotage district for the appointment of pilots, within which no particular provision is made by act of parliament or charter (*o*). And in general, the employment of pilots in the first and third of these districts, is compulsory (*p*). But this is accompanied by an enactment that the following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London District

(*m*) 17 & 18 Vict. c. 104, s. 340, et vide s. 355.

(*n*) Sect. 353.

(*o*) Sect. 370.

(*p*) Sect. 376. As to the penalty for not employing a qualified pilot where it is compulsory to do so, see ss. 354, 376.

and the Trinity House Outport districts, that is to say, 1. Ships employed in the coasting trade of the united kingdom. 2. Ships of no more than sixty tons burthen. 3. Ships trading to Boulogne, or to any place in Europe north of Boulogne. 4. Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone, the produce of those islands. 5. Ships navigating within the limits of the port to which they belong. 6. Ships passing through the limits of any pilotage district, on their voyages between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein (*q*).

The act contains also a general enactment, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*r*).

V. The laws relating to lighthouses, beacons, and sea marks.

The power of erecting, placing and maintaining these is, as formerly shown (*s*), incident to the royal prerogative. By 8 Eliz. c. 13, however, it was specially committed to the Trinity House; and the authority of this body over the subject has, since the reign of Elizabeth, been confirmed and regulated by several modern statutes, but principally by the Merchant Shipping Act, 1854 (*t*), in which are to be found almost all the provisions relating to that subject, which are now in force (*u*).

(*q*) 17 & 18 Vict. c. 104, s. 379.

(*r*) Sect. 388.

(*s*) Sup. vol. II. p. 513.

(*t*) 17 & 18 Vict. c. 104, ss. 2, 389—416.

(*u*) Almost all former enactments with respect to lighthouses, beacons and sea marks are repealed by 17 & 18 Vict. c. 120, sched., viz. 8 Eliz. c. 13 (except sect. 5); 26 Geo. 3, c. 101; 52 Geo. 3, c. 115; 6 Geo. 4, c. 125; 9 Geo. 4, c. 86; 6 & 7 Will. 4, c. 79 (except the parts specified in 17 & 18 Vict. c. 120, s. 4); 1 & 2 Vict. c. 66; 14 & 15 Vict. c. 79.

By this act it is provided, that, subject to any power or rights then lawfully exercised by any persons having authority over *local* lighthouses, buoys or beacons (*x*), (termed by the act Local Authorities,) the superintendence and management of all lighthouses, buoys and beacons, shall be vested (for England, Wales, Jersey, Guernsey, Sark and Alderney, and the adjacent seas and islands, Heligoland, and Gibraltar), in the Trinity House;—(for Scotland and the adjacent seas and islands, and the Isle of Man), in the Commissioners of Northern Lighthouses appointed by the Act;—(for Ireland and the adjacent seas and islands), in the Port of Dublin Corporation (*y*);—these bodies being distinguished from the Local Authorities by the name of General Lighthouse Authorities (*z*): and each of the latter having power, with sanction of the Board of Trade, to regulate, within its own jurisdiction, the proceedings of the former (*a*); while the latter are themselves under the control of the Board of Trade (*b*).

To each of the General Lighthouse Authorities the act also gives power, within its own jurisdiction, to erect or make new lighthouses, buoys or beacons, or alter or remove existing ones; and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*c*): But these powers are not to be exercised in the case of the General Lighthouse Authorities for Scotland or Ireland, without the sanction of the Trinity House; which sanction is itself to be subject, in such manner as the act points out, to the paramount control of the Board of Trade (*d*). Power is also given to the Trinity House, acting under the *previous sanction of the Board of Trade, to direct the General Lighthouse Authorities for Scotland or Ireland, to*

(*x*) "Lighthouses," as used in this act, includes floating and other lights exhibited for the guidance of ships, and "buoys and beacons" include all other marks and signs of the sea (17 & 18 Vict. c. 104, s. 2.)

(*y*) The case of colonial lighthouses is separately provided for by 18 & 19 Vict. c. 91.

(*z*) 17 & 18 Vict. c. 104, s. 389.

(*a*) Sect. 394.

(*b*) Sect. 393.

(*c*) Sect. 404.

(*d*) Sects. 405, 406.

continue any existing lighthouses, buoys, or beacons,—to erect or place, alter or remove, any new ones,—or to vary the character of any lighthouse, or the mode of exhibiting lights therein (e).

Again, the act provides, that upon the completion of any new lighthouse, buoy or beacon, her majesty may by order in council fix such *dues* in respect thereof, to be paid by the master or owner of every ship which passes the same or derives benefit therefrom, as her majesty may deem reasonable (*f*): but that no dues for any such work, in Guernsey, Jersey, Sark or Alderney, shall be taken without consent of the States of those islands respectively; nor shall any powers given to the Trinity House in respect of any lighthouse, buoy or beacon placed or hereafter to be placed in Guernsey or Jersey, be exercised without consent of her majesty in council (*g*).

And the act contains moreover provisions against persons who shall either wilfully or negligently injure any lighthouse, buoy, or beacon; or remove, alter or destroy any light-ship, buoy or beacon; or ride by, make fast to, or run foul of any light-ship or buoy: or who shall burn or exhibit (after being duly warned against it by notice from the proper General Lighthouse Authority,) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*h*).

VI. The laws relating to the liability of shipowners for loss or damage.

In a former portion of the work (*i*) we had occasion to state the nature and extent of a shipowner's responsibility where loss or damage has occurred to *goods on board of his ship* and entrusted to his care; and to that statement the reader is consequently now referred. The responsibility of

(*e*) 17 & 18 Vict. c. 104, ss. 408, 409.

(*f*) Sect. 410. As to light dues in respect of works existing when the act passed, see sects. 396, 397.

(*g*) Sect. 411.

(*h*) Sects. 414—416.

(*i*) Vide sup. vol. II. p. 86.

the shipowner, however, is not confined to this case. It extends also to the case where *loss of life or personal injury* has, through mismanagement of his ship, been occasioned to any person; and to the case where loss or damage has, through the like cause, occurred to *any other ship or boat, or to goods on board of the same.* And in these latter cases, as well as the former, a limit is placed by the Merchant Shipping Act, 1854, to the amount of damages recoverable from an owner who is personally blameless (*l*). It provides, that no owner of any sea-going ship or share therein, where, without his actual fault or privity, any loss of life, or personal injury, is caused to any person being carried in such ship, or by reason of the improper navigation thereof, caused to any person carried in any other ship or boat,—or where without his actual fault or privity, and by reason of such improper navigation, loss or damage is caused to any other ship or boat, or to any goods on board of the same,—shall be answerable in damages to an extent beyond the value of his ship and the freight due, or to grow due in respect of her during the voyage: subject, however, as regards loss of life or personal injury to any passenger, to the proviso that the value of the ship or freight shall in no case be taken to be less than 15*l.* per registered ton (*m*).

With a view also to the protection of the shipowner from the multiplicity of actions to which a single casualty may otherwise expose him, where loss of life or other per-

(*l*) 17 & 18 Vict. c. 104, ss. 502—529. By sect. 502, the provisions of this act, as to the liability of shipowners, apply to the whole of her majesty's dominions. By 17 & 18 Vict. c. 120, sched., the previous acts of 7 Geo. 2, c. 15; 26 Geo. 3, c. 86, and 53 Geo. 3, c. 159 (which also contained provisions restraining that liability), are repealed.

(*m*) 17 & 18 Vict. c. 104, s. 504. In all cases where this act limits the shipowner's responsibility to the value of his ship and freight, the freight is to include the value of the carriage of any goods belonging to the owner himself and passage money, and also the hire due or to grow due under any contract, except only such hire, in the case of a ship hired for time, as may not begin to be earned until the expiration of six months after the loss or damage.—Sect. 505.

sonal injury has resulted, or is alleged to have resulted, from it, to a great number of persons; and to mitigate in other respects the severity of its consequences as regards the compensation to be made by him; this Act has established the following method of procedure for settlement of his total liability in regard to all such results.

The Board of Trade may at its discretion, after giving such notice as the Act describes to the owner or owners of the ship, direct the sheriff having jurisdiction at some place in the united kingdom, to summon such jury as therein also described, to inquire into the number, names and descriptions of all the persons killed or injured, and to determine the question of the liability of the owner or owners;—at which inquiry the sheriff shall preside, and the Board of Trade shall be deemed plaintiff, and the owner or owners of the ship defendant. If the verdict is for the defendant, his costs are to be paid him by the Board of Trade out of the Mercantile Marine Fund (*n*): if for the plaintiff, damages are to be assessed at 30*l.* for each case of death or personal injury. Their amount is to be paid to her Majesty's paymaster-general, and is to be distributed by him as the Board of Trade directs; the board having power to direct payment to each person injured,—or in case of a death, to the husband, wife, parent or child of the deceased,—of such compensation, (not exceeding in any case the statutory amount), as the board may think fit. Until this inquiry has been instituted,—or until the board has refused to institute it (*o*),—no person is to be entitled to commence any legal proceeding in respect of his claim for loss of life or personal injury (*p*); but after its com-

(*n*) This fund comprises a variety of different fees and sums received under the act by the Board of Trade, by the Trinity House, and by Receivers of Wreck; and is chargeable with the expense of a variety of services under the act. The account of it is kept with her Majesty's paymaster-general.—Sect. 417.

(*o*) It will be considered to have done so where it institutes no inquiry for one month after the service of a notice, by any person, of his desire to commence a legal proceeding.—17 & 18 Vict. c. 104, s. 512.

(*p*) Sect. 512.

pletion, if any claimant estimates the damages in respect of his own injury, or if the executor or administrator of any deceased person estimates the damages in respect of his death, at a greater sum than the statutory amount, (or such amount as the Board of Trade, by virtue of a power given by the act, has thought fit to take by way of compromise,)—he is to be at liberty, upon repayment or obtaining the repayment to the owner of the amount he has paid for such death or injury, to bring his action for damages, as if no power of instituting an inquiry had been given to the board;—but subject to this proviso, that any damages which he may recover shall be payable only out of the residue (if any) of the aggregate amount for which the defendant is liable, after deducting from it the amount of all sums he has paid to the paymaster-general; and that if the damages so recovered do not exceed double the statutory amount, he shall pay the defendant all the costs of the action, to be taxed as between attorney and client (q).

Nor are these the only provisions of the Act for protection of the shipowner; for it also enacts, that in all cases where there are several claims against any such party for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats or goods,—it shall be lawful for the High Court of Chancery (subject only to the right given as above mentioned to the Board of Trade for settlement of the liability in regard to loss of life or personal injury), to entertain proceedings at the suit of such party, for the purpose of determining the amount of the liability; and distributing such amount rateably among the several claimants; and stopping all suits which are pending in any other court, in relation to the same subject matter (r).

With regard, however, to all that part of the Act, which tends to the benefit of the shipowner, it is material to re-

(q) 17 & 18 Vict. c. 104, s. 511. (r) Sect. 514.

mark, that nothing which it contains is to lessen or take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman,—nor to extend to any British ship not being a "*recognized British ship*" within the meaning of the act (*s*).

VII. The laws relating to fisheries.

We cannot consistently with the design and necessary limits of the present work, attempt to detail the numerous provisions which our statute book contains in regard to fisheries. It will suffice to point out some of the principal features of our policy in relation to this subject.

And, first, we may remark, (as to England and Scotland,) that a great variety of acts of parliament are in force relating to fisheries; and chiefly for the protection of the breed of fish, and the prevention of any practices tending to destroy the spawn or fry (*t*). They are principally as follows:—13 Edw. I. st. 1, c. 47; 13 Ric. II. st. 1, c. 19; 17 Ric. II. c. 9; 2 Hen. VI. c. 15; 1 Eliz. c. 17; 3 Jac. I. c. 12; 30 Car. II. st. 1, c. 9; 1 Geo. I. st. 2, c. 18; 33 Geo. II. c. 27, s. 13, &c.; 15 Geo. III. c. 31; 48 Geo. III. c. 110; 55 Geo. III. c. 94; 58 Geo. III. c. 43; 7 & 8 Geo. IV. c. 29, s. 36; c. 30, s. 15; 9 Geo. IV. c. 39; 6 & 7 Vict. c. 33; 7 & 8 Vict. c. 95; 8 & 9 Vict. c. 26; 9 & 10 Vict. c. 80; 10 & 11 Vict. cc. 91, 92; 11 & 12 Vict. c. 52; 13 & 14 Vict. c. 80; 14 & 15 Vict. c. 26.

Secondly, that the trade in fish, as regards the cities of London and Westminster, is regulated by certain Acts passed for that special purpose; the general object of which is to secure a supply of fresh fish to those cities, and to prevent the forestalling of the same. The Acts are 22 Geo. II. c. 49; 29 Geo. II. c. 39; 33 Geo. II. c. 27;

(*s*) 17 & 18 Vict. c. 104, s. 516. As to the term "recognized British ship," vide sup. p. 249.

(*t*) See Mayor of Maldon *v.* Woolvet, 12 A. & E. 13.

2 Geo. III. c. 15; 30 Geo. 3, c. 54; 36 Geo. 3, c. 118; 4 & 5 Will. IV. c. 20.

Thirdly, that persons employed in the fisheries, in such manner and under such circumstances as defined by the 50 Geo. III. c. 108, are by that statute exempted from impressment.

Fourthly, that fresh fish of British taking, and imported in British ships, may be landed without report or entry (*u*).

Fifthly, that Acts have been of late years frequently passed, enabling commissioners appointed for that purpose, to sanction the advance of public monies, on loan, for the encouragement of the fisheries, as well as of public works and other national undertakings; the last of which Acts was the 19 & 20 Vict. c. 17.

Sixthly, that *bounties* were formerly payable by act of parliament upon the taking and curing of fish of various descriptions, and on the vessels employed in various branches of the fisheries; but that, the policy in this respect having been lately altered, these bounties are abolished by 1 & 2 Geo. IV. c. 79; 5 Geo. IV. c. 64; 7 Geo. IV. c. 34 (*x*).

Seventhly, that the fisheries of Ireland are now regulated by recent Acts, 5 & 6 Vict. c. 106; 7 & 8 Vict. c. 108; 8 & 9 Vict. c. 108; 9 & 10 Vict. cc. 3, 114; 10 & 11 Vict. c. 75; 11 & 12 Vict. c. 92; and 13 & 14 Vict. c. 88;—by which almost all the former statutes on that subject are repealed, and their provisions consolidated and amended. In the Irish fisheries, as regulated by these Acts, the principle of bounty, (which as to those as well as the British fisheries had been previously abandoned (*y*),) is not revived.

Lastly, that a treaty was concluded in 1839 between her Majesty and the late king of the French, defining the

(*u*) 16 & 17 Vict. c. 107, s. 49.

(*x*) See 11 Geo. 4 & 1 Will. 4, c. 54. The curing of herrings is regulated by 14 & 15 Vict. c. 26.

(*y*) 1 & 2 Geo. 4, c. 79; 5 Geo. 4, c. 64; 7 Geo. 4, c. 34.

limits of exclusive fishery between the British Islands and France, and carried into effect by 6 & 7 Vict. c. 79 (*z*), (amended by 18 & 19 Vict. c. 101); and that in 1854 a treaty was also concluded between her Majesty and the United States of America, relating *inter alia* to the rights of fishery as between the British North American colonies and the United States; which last-mentioned treaty was carried into effect by the 18 & 19 Vict. c. 3.

(*z*) See also the interim act, 2 & 3 Vict. c. 96, continued by 5 & 6 Vict. c. 63.

CHAPTER IX.

OF THE LAWS RELATING TO THE SANATORY CONDITION OF THE PEOPLE.

THE attention of the legislature has, from the reign of James the first, been at various times directed to the subject of pestilent and contagious disease; and to the establishment of such precautions as human knowledge and sagacity might devise, for averting its course or mitigating its effects.

The enactments which have been introduced in reference to this matter have principally had in view the particular maladies of Plague, Cholera, and Small-pox; but sanatory regulations of a more general character have within a recent period been copiously established.

First. With respect to *Plague*, very stringent enactments were introduced by 1 Jac. I. c. 31;—a statute which made it a capital felony for any person having an infectious sore upon him uncured to go abroad and converse in company, after being commanded by the proper authority to keep his house. The necessity, however, of any regulations adapted to an actual prevalence of this disease among us, has been long since at an end,—no plague having, by the blessing of Providence, been known in this island for more than 170 years past; and the statute of James, after remaining for so long a period dormant, was at length in the reign of her present Majesty repealed (*a*).

But besides the act of James above referred to, our statute book contains several others on the subject of the

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

plague; the main object of which is not so much to regulate the conduct of infected persons during its prevalence, as to exclude it altogether from our population.

We here refer to the laws relating to *quarantine* (*b*); the term applied to that period of probation during which vessels arriving from countries infected with plague, or other contagious disorder, are restrained by law from general intercourse.

The first statute on the subject was 9 Ann. c. 2, which was followed by several others in the reigns of George the first and George the second; but at length all former provisions were repealed by 6 Geo. IV. c. 78, which consolidates the whole law now in force with respect to quarantine.

By this last-mentioned statute it is enacted, that all vessels, as well of war as others, coming from any place, from whence the crown, by the advice of the privy council, shall have adjudged it probable that the plague or other infectious disease of a highly dangerous kind may be brought; and all vessels and boats receiving persons or goods out of the same; and all persons and goods on board the vessels so arriving, or so receiving as aforesaid; —shall be liable to quarantine within the meaning of the act, and of any order or orders in council concerning quarantine: and shall be obliged to perform quarantine in such place or places (known by the name of *lazarets*), for such time, and in such manner, as shall from time to time be directed by any order in council, notified by proclamation or published in the London Gazette: and, until they shall have been discharged from such quarantine, shall not come on shore, or be put on board any other vessel or boat, except in such cases, and by such licence, as the order in council may direct (*c*). And in case of breach of quaran-

(*b*) The earliest known regulations in the nature of quarantine laws are those contained in an edict of Justinian, A.D. 542. In modern times the example has been followed in all the principal countries of Europe.

(*c*) 6 Geo. 4, c. 78, s. 2.

tine, either as to persons or goods, the offender is visited with heavy fine; and any person escaping from quarantine is besides punishable with imprisonment for six months (*d*). But, on the other hand, the privy council are empowered, if they shall think fit, to shorten in any case the period of quarantine; or absolutely release therefrom any particular vessels, persons, or goods (*e*).

Every commander or other person having the charge of any vessel liable to the performance of quarantine is also required, whenever he shall meet any vessel at sea, or be within two leagues of the coast or its adjacent islands, to hoist, and keep hoisted, such signal as required by the act, to denote that he is liable to the performance of quarantine: or (if the fact be so) that he has the plague or other highly dangerous and infectious disease on board (*f*): and every commander or other person having the charge of any vessel coming from foreign parts is also directed to give to the pilot, who shall go on board, a written paper containing a true account of the places where the vessel has traded or touched; and, if the vessel is not liable to quarantine in respect of place, a written paper containing a true account of the different articles composing the cargo; and if by any order in council made since his departure, such places or goods have been made liable to quarantine, the pilot is forthwith bound to give him notice thereof, and the commander shall thereupon hoist a signal according to the act; and the pilot is prohibited from taking such vessel into any port not specially appointed for performing quarantine (*g*).

Besides many other regulations too minute to be here set forth, it is further provided, that the lords of the privy council, or any two of them, may make such order as they shall see necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel and goods arriving and having any infectious disease on board, or

(*d*) 6 Geo. 4, c. 78, ss. 17, 26.

(*e*) Sect. 6.

(*f*) Sects. 8, 9.

(*g*) Sects. 11, 12.

arriving under any suspicious circumstances as to infection; and this, although such vessels shall not have come from any place from which the crown has declared it probable that the plague or other disease may be brought (*h*): and a similar power is likewise committed to the Privy Council in the case of any infectious disease or distemper breaking out in the united kingdom; so as to enable them to cut off communication between persons afflicted therewith, and the rest of the subjects of the realm (*i*).

Secondly. As to *Cholera.*

The visitation of the kingdom by the spasmodic or Indian Cholera, gave occasion in 1832 to the act 2 Will. IV. c. 10, by which the privy council were empowered to issue orders such as might appear expedient, with a view to prevent the spread of this fearful disease; or for the relief of persons afflicted thereby; or the interment of those who became its victims. And by the 3 & 4 Will. IV. c. 75, this act was continued until the end of the then next session of parliament. But at the expiration of that period the cholera had wholly disappeared, and the act was not further continued, nor has it been hitherto revived.

Thirdly. As to *Small-pox.*

By 3 & 4 Vict. c. 29, (amended by 4 & 5 Vict. c. 32,) the guardians of every parish or union, or the overseers of every parish where there are no guardians, are to contract (subject to the regulation of the Poor Law Board,) with the medical officers of the union or parish, or with other persons, for the vaccination of its inhabitants; and any person who may produce, or attempt to produce, by inoculation or otherwise, the disease of small-pox in any person in England, Wales, or Ireland, shall be liable to be proceeded against and convicted summarily before two or more justices of the peace in petty sessions; and for every such offence be imprisoned for a term not exceeding one month.

By 16 & 17 Vict. c. 100, also, it is made imperative on

(*h*) 6 Geo. 4, c. 78, s. 6. (*i*) Ibid.

the parent, (or other person having the care, nurture or custody,) of every child born in England or Wales after 1st of August, 1853, to proceed at such time and in such manner as in that act set forth, to procure its vaccination by the medical officer or practitioner appointed for the purpose in the union or parish where the child is resident, except only in the case where the child has been previously vaccinated by some duly qualified medical practitioner, and where such vaccination shall be duly certified; and every parent or other person neglecting this duty, after receiving notice to perform it from the registrar of births and deaths of the sub-district to which the case belongs, shall forfeit a sum not exceeding twenty shillings: which shall be recoverable before any two justices of the peace for the county or borough where the offence is committed.

As for the more general provisions which tend to the preservation and improvement of the public health, they have issued from the legislature, during the last few years, with a profusion that makes it impossible to enter into a full detail of them, without allotting more space to the particular subject than the plan of the work permits. We can only advert to such as are of a more directly sanatory character; and which relate either to the public health in general, or more particularly to the removal of nuisances.

First. By 11 & 12 Vict. c. 63 (called "The Public Health Act, 1848,") (as amended and continued by subsequent acts (*j*)), a "General Board of Health" is constituted: the members of which are a president, appointed during her Majesty's pleasure; the principal secretaries of state for the time being; and the president and vice-president for the time being of the Board of Trade;—with power to appoint for its assistance a medical council and a medical officer. And it is provided, that, upon the petition of not less than

(*j*) See the following acts for amending and continuing "The Public Health Act, 1848," 17 & 18 Vict. cc. 69, 95; 18 & 19 Vict. c. 115; 19 & 20 Vict. c. 85; 20 & 21 Vict. c. 38.

one-tenth of the inhabitants rated to the relief of the poor in any place (not being less than thirty in the whole),—or if it shall appear from the last return of the Registrar-general that the number of deaths registered in not less than seven years in that place, has on an average exceeded annually the proportion of 23 to 1000 of the population;—the General Board of Health may direct a superintending Inspector to visit the place, and institute a preliminary inquiry into all matters connected with its sanatory condition, and report thereon to the board: and if it shall appear to the board expedient, that the act should be applied to that place, the same shall be applied accordingly, either by order in council; or, under certain circumstances (*k*), by a provisional order of the board, to be confirmed by an act of parliament (*l*). The act, when so made applicable to any place, is to be carried into effect there, by a "Local Board of Health," (which, as regards corporate boroughs, is to be the town council of the borough, and, as regards other places, is to be elected by the owners and rate-payers); and this local board is to have power to appoint officers, and to be charged with a great variety of duties, and to be clothed with corresponding powers,—in relation to sewers (*m*), drains, privies, the removal of nuisances, the regulation of slaughter-houses, and common lodging houses; the control over streets (*n*), water and gas works; the supply of water (through the medium of existing water companies, if any are already established adequate to such supply); and other matters

(*k*) That is, in cases where the act is to be put in force within boundaries not the same with those of the place petitioning; or from which there is no petition; or in which any local act of parliament for paving, cleansing, &c., is in force. (11 & 12 Vict. c. 63, s. 10.)

(*l*) See a recent act of this kind, 20 & 21 Vict. c. 22.

(*m*) There is an exception, however, as to sewers under the authority of commissioners of sewers, ss. 43, 145.

(*n*) Within the limits of their district the local board of health are to be (exclusively of any other person) the surveyor of the highways, s. 117. (See Clayton *v.* Fenwick, 6 Ell. & Bl. 114.)

connected with the sanatory improvement of the place. The local board of health is also to have the power (with approval of the general board), to provide premises for the purpose of being used as public walks or pleasure grounds; and to contribute towards any premises provided by private benevolence, for such purposes; and to make representation to the general board, as to any burial grounds, church-yards, or vaults, which may be in a state dangerous to health. And the expenses connected with all these duties are to be defrayed out of local rates; to be made either prospectively or retrospectively, and to be levied in general on the occupiers of property liable to the poor rate.

Secondly. By 18 & 19 Vict. c. 116, called "The Diseases Prevention Act, 1855," it is provided, that when any part of England appears to be threatened with or is affected by any formidable epidemic, endemic, or contagious disease,—the lords of the Privy Council, or any three or more of them (the lord president being one), may, by order, direct that act to be put in force: and, while the same is so in force, the General Board of Health may issue directions as it may think fit for speedy interments; for visitation from house to house; for the dispensing of medicines, guarding against the spread of disease, and affording such medical aid and accommodation as may be required: and the execution of such directions shall belong to the "local authority," under any general act in force for the time being, for the removal of nuisances.

Thirdly. By 18 & 19 Vict. c. 121 (*o*), called "The Nuisances Removal Act for England, 1855," it is enacted, that the "local authority" which it establishes in each place for its execution,—that is, in general, the "Local Board of Health" for the place (*p*),—shall appoint or join

(*o*) This act repeals (so far as they relate to England) the 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111, on the same subject. There had been a previous act of 9 & 10 Vict. c. 96, which expired in 1848.

(*p*) As to the Local Board of Health, vide sup. p. 271. In any place where the Public Health Act is not in force, other local authorities are appointed by the 18 & 19 Vict. c. 121, according to the following

with other local authorities, in appointing, a "Sanatory Inspector" or "Inspectors" to attend at their office and their meetings; to enter their minutes and keep their accounts; to examine into the state of facts with regard to nuisances (q); and generally to fulfil the instructions of the local authority as the occasion may arise: and the local authority is also empowered by its own act, or that of its sanitory inspector or other officers, to examine premises as to which suspicion exists or complaint is made; and to inspect articles of food exposed for sale or in the course of carriage or preparation for sale or use; and to obtain an order from two justices of the peace in petty sessions, (after summoning the offender before them,) for the abatement or discontinuance of any nuisance that may have been found on such premises, or for the destruction of any article of food so examined, which the justices may deem unfit for the food of man (r).

order:—The Town Council; the Commissioners under Local Acts; the Highway Board; a committee for carrying the act into execution, which may be appointed for the place by the name of "The Nuisances Removal Committee;" the Board of Inspectors for Lighting and Watching, under 3 & 4 Will. 4, c. 90; and lastly, the Guardians and Overseers of the Poor and the Surveyors of Highways for the place;—each of the five bodies last above mentioned being in turn the local authority, in case of the non-existence of the body next before it in the series.

(q) In 18 & 19 Vict. c. 121, s. 8, a description is given of the different "nuisances" which are to be deemed as falling within the act.

(r) Sect. 12—27. As to the funds out of which the expenses which may attend the proceedings of the local authority are to be defrayed, see sect. 7.

In addition to the statutes of which some accout is above given, there are the following more or less immediately connected with the subject of the sanatory condition of the people:—

3 & 4 Will. 4, c. 103; 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 38.—*Labour in Factories.*

9 & 10 Vict. c. 74; 10 & 11 Vict. c. 61.—*Baths.*

11 & 12 Vict. cc. 105, 107; 13 & 14 Vict. c. 71; 14 & 15 Vict. c. 69; 15 & 16 Vict. c. 11; 19 & 20 Vict. c. 101.—*Contagious Disorders among Cattle.*

12 & 13 Vict. c. 111, s. 9—12; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 79; c. 105, ss. 11—13; c. 128; 20 & 21 Vict. c. 81.—*Burials.*

14 & 15 Vict. c. 13.—*Sale of Arsenic.*

14 & 15 Vict. c. 28; 16 & 17 Vict. c. 41; 18 & 19 Vict. c. 121, s. 43.—*Common Lodging Houses.*

14 & 15 Vict. c. 34; 18 & 19 Vict. c. 132.—*Lodging Houses for Labouring Classes.*

18 & 19 Vict. c. 108 (repealing 13 & 14 Vict. c. 100).—*Inspection of Coal Mines.*

See, also, as to the *Metropolis*:—

11 & 11 Vict. c. 112; 12 & 13 Vict. c. 93; 14 & 15 Vict. c. 75; 15 & 16 Vict. c. 64; 16 & 17 Vict. c. 125; 17 & 18 Vict. c. 111;

18 & 19 Vict. c. 30.—*Sewers.*

13 & 14 Vict. c. 52; 14 & 15 Vict. c. 89; 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 20 & 21 Vict. cc. 35, 81.—*Burials.*

15 & 16 Vict. c. 84.—*Supply of Water.*

16 & 17 Vict. c. 128; 18 & 19 Vict. c. 121, s. 43; 19 & 20 Vict. c. 107.—*Smoke Furnaces.*

18 & 19 Vict. c. 122.—*The Building Act.*

18 & 19 Vict. c. 120 (amended by 19 & 20 Vict. c. 112).—*For the better Management of the Metropolis.*

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CARRIAGES AND CONVEYANCES.

It has been the policy of the legislature of this country to exercise over this department of social economy, merely a general supervision; and to trust to the enterprise of individuals or societies, for providing for the welfare and convenience of the public in this important particular.

In our treatment of it, we shall distribute the subject under the following heads: I. Stage Coaches. II. Railways. III. Conveyances by water.

I. The provisions relative to *stage coaches* in general (*a*), will be found embodied in 2 & 3 Will. IV. c. 120:—amended by 3 & 4 Will. IV. c. 48; 2 & 3 Vict. c. 66; and 5 & 6 Vict. c. 79.

By the first of these Acts, a "stage carriage" is determined to be every carriage, (whatever be its form or construction,) which is drawn by animal power; and used for the purpose of conveying passengers for hire, to and from any place in Great Britain; and travelling at the rate of three miles or more in the hour; and for which separate fares shall be charged to separate passengers (*b*).

(*a*) The provisions relating to hackney coaches in London, and to "Metropolitan Stage Carriages," (which last term, according to 6 & 7 Vict. c. 86, comprises "any stage "carriages except such as shall, on "every journey, go to or come from "some town or place beyond the "limits of the city of London and "the liberties thereof, and Metro-"politan Police District,") are not noticed in the text, their character being merely local. But they will be found in 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; and 16 & 17 Vict. cc. 33, 127.

(*b*) 2 & 3 Will. 4, c. 120, s. 5.

No carriage is to be kept for this purpose, unless the person who keeps it has a licence so to do from the Board of Inland Revenue, which must be yearly renewed, and in respect of which certain duties are made payable (*c*); nor unless there be fixed on such carriage, in manner as by the several acts provided, such numbered plates and particulars as are thereby directed to be fixed and painted on the carriage: and such painted particulars are to specify the christian and surname of the proprietor, or one of the proprietors; the extreme places to which the licence extends; and the greatest number of inside and outside passengers which the carriage may lawfully convey (*d*).

Numerous penalties are imposed on the drivers of these carriages, for offences or neglects which would seem to militate against the safety or convenience of the public. Among these may be mentioned—driving a stage coach without or with a defective licence, or without having such plates and painted particulars as above referred to (*e*); carrying too many passengers or too much luggage (*f*); and in short any intoxication, negligence, furious driving, or other misconduct, in the driver or conductor, which shall endanger the safety of any passenger or other person, or the property of any person, including the proprietor of the coach (*g*).

(*c*) 2 & 3 Will. 4, c. 120, s. 6. These duties now form part of the excise, 10 & 11 Vict. c. 42, s. 2. Their amount has been recently reduced by 18 & 19 Vict. c. 78, ss. 1, 2, which act also repeals so much of the 2 & 3 Will. 4, c. 120, as authorizes a composition for these duties.

(*d*) 2 & 3 Will. 4, c. 120, s. 36; 5 & 6 Vict. c. 79, ss. 11, 13, 14. As to *mail* coaches, and how far they are excepted, see 2 & 3 Will. 4, c. 120, s. 46; 5 & 6 Vict. c. 79, s. 12.

(*e*) 2 & 3 Will. 4, c. 120, s. 30—36: 5 & 6 Vict. c. 79, s. 14.

(*f*) 3 & 4 Will. 4, c. 48, ss. 2, 3, 4; 5 & 6 Vict. c. 79, s. 15.

(*g*) 2 & 3 Will. 4, c. 120, s. 48. As to the right of action of passengers for negligence, &c. of the driver, vide post, bk. v. c. VIII. By 1 Geo. 4, c. 4, wanton and furious driving or racing of public carriages, when followed by maim or other injury to the person, is a misdemeanor, punishable by fine and imprisonment.

Besides all which, by 2 & 3 Will. IV. c. 120 (*h*), it is provided, that if it shall happen that the driver, conductor, or guard of any stage carriage, shall have committed any offence against that act, but is not known, or being known, cannot be found, the proprietor shall be liable to the same penalty as if he had been driver when the offence was committed; unless he can prove by any other evidence besides his own testimony, and to the satisfaction of the justice of the peace before whom the complaint was heard, that the offence was committed without his privity or knowledge, and that he has derived no benefit therefrom, and that he has used his endeavours to find out such driver, conductor, or guard, and given all reasonable information in answer to inquiries respecting him.

II. *Railways.*

Besides the several Acts from time to time passed which authorize the construction of particular railways, there exist the following acts of general regulation (*i*); 1 & 2 Vict. c. 98; 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; 8 & 9 Vict. c. 96; 9 & 10 Vict. c. 57; 14 & 15 Vict. c. 19, ss. 6, 8, 10, and c. 64 (*k*); 17 & 18 Vict. c. 31.

By these statutes, the general supervision and regulation of all railways is intrusted to the committee of her Majesty's privy council for trade and foreign plantations, commonly called the Board of Trade (*l*). These acts moreover, render it unlawful to open any railway (*m*), or

(*h*) As to the production of the driver, &c. by the proprietor, see also 6 & 7 Vict. c. 86, s. 35; 12 & 13 Vict. c. 92, s. 22.

(*i*) See also the "Railways Clauses Act," 8 & 9 Vict. c. 20, consolidating into one act the provisions usual in making railways.

(*k*) Repealing 9 & 10 Vict. c. 105.

(*l*) By an act of 9 & 10 Vict. c. 105, this jurisdiction was transferred from the board of trade, to certain commissioners appointed by her Majesty, called "Commissioners of Railways;" but this act is now repealed by 14 & 15 Vict. c. 64, and the jurisdiction restored to the Board of Trade.

(*m*) 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55, s. 2.

portion of railway, for the public conveyance of passengers, until a month's notice in writing shall have been given by the company to whom it may belong, to the Board of Trade, of their intention of opening the same; and ten days' notice of the time when the railway will be open for inspection (n).

It is further enacted, by the statutes above mentioned, that the Board of Trade may postpone the opening of any railway, until satisfied that it may take place without danger to the public: may order every railway to make returns of the aggregate traffic in passengers, cattle, and goods, of the occurrence of any serious accident, and a table of all tolls and rates from time to time levied (o); and may also appoint proper persons as inspectors of railways (p).

Every railway company is also required (whether called upon to do so or not), to report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (q); and to lay before the board, for their approbation, certified copies of the bye-laws and regulations by which the railway is governed (r): which bye-laws may be disallowed by the board at its pleasure: and the board is moreover empowered to direct the attorney-general to proceed against any railway company for their non-compliance with the provisions either of particular Acts, or the Acts of general regulation, or their commission of any act unauthorized by law (s).

Provisions are also made to regulate the liability of a railway company for neglect or default in the carriage of goods (t); to authorize the summary apprehension and

(n) 5 & 6 Vict. c. 55, ss. 4, 5.

(o) 3 & 4 Vict. c. 97, s. 3; 5 & 6 Vict. c. 55, s. 8. As to the railway *clearing system*, and the regulations as to legal proceedings by or against the associated committees, see 13 & 14 Vict. c. xxxiii.

(p) 3 & 4 Vict. c. 97, s. 5; 7 & 8 Vict. c. 85, s. 15.

(q) 5 & 6 Vict. c. 55, s. 7.

(r) 3 & 4 Vict. c. 97, ss. 7, 8.

(s) 7 & 8 Vict. c. 85, ss. 16—18.

(t) 8 & 9 Vict. c. 20, s. 89; 14 & 15 Vict. c. 19, ss. 6, 8, 10; 17 & 18 Vict. c. 31, s. 7, vide sup. vol. II. p. 85, n. (z).

punishment of any engine-driver or servant of the company guilty of any misconduct (*u*); and to subject to severe punishment all ill disposed persons obstructing any engine or carriage, or endangering the safety of the passengers. (*x*).

Railway companies are obliged to maintain and repair good and sufficient fences along their lines (*y*); to transport, at a settled rate, military and police forces (*z*), and mails (*a*); to afford all reasonable facilities for the conveyance of traffic, without undue preference of particular persons or companies, or particular descriptions of traffic (*b*); to permit and facilitate the introduction of electrical telegraphs upon their lines (*c*); to construct their railway (as a general rule) on a gauge of four feet eight inches and a half in England, and five feet three inches in Ireland (*d*); to keep a strict account of money received for the conveyance of passengers, or from other sources, upon their respective lines; to deliver the same to the Board of Inland Revenue; and to pay a monthly duty thereupon (*e*).

By 7 & 8 Vict. c. 85, it is provided, that if, twenty-one

(*u*) 3 & 4 Vict. c. 97, ss. 13, 14; 5 & 6 Vict. c. 55, ss. 17, 18.

(*x*) 3 & 4 Vict. c. 97, s. 15; 14 & 15 Vict. c. 19, ss. 6, 7.

(*y*) 5 & 6 Vict. c. 55, s. 10.

(*z*) Sect. 20; 7 & 8 Vict. c. 85, s. 12.

(*a*) 1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11.

(*b*) 17 & 18 Vict. c. 31, ss. 1—6. By this act of 17 & 18 Vict. c. 31, called "The Railways and Canal Traffic Act, 1854," it is made lawful for any company or person to make complaint, in England, to the Court of Common Pleas, in respect of any thing done or omitted to be done by any Railway Company in violation of the act, and, if necessary, a writ of injunction or interdict may be issued by that court to restrain the company from any further violation of it; and general rules may be issued by that court for proceedings under the act. A set of such rules was accordingly issued bearing date 31st January, 1855. As to the construction of the act, see the following cases:—Re Catersham Railway Company, 1 C. B. (N. S.) 410; Barret v. Great Northern Railway Company, ibid. 423; Ransome v. Eastern Counties Railway Company, ibid. 437; Re Oxlade, ibid. 457; Re Marriott, ibid. 499.

(*c*) 7 & 8 Vict. c. 85, ss. 14, 15.

(*d*) 9 & 10 Vict. c. 57.

(*e*) 5 & 6 Vict. c. 79, s. 4; 10 & 11 Vict. c. 42.

years after the establishment of any passenger railway, by Act of that or any future session, the average profit for the three last years upon the paid-up capital stock shall be found to have amounted to 10*l.* per cent., her Majesty's government shall be at liberty, (an act of parliament being first obtained for that purpose,) to revise and reduce the fares upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale; or may, by the like sanction, (whether the average profits have been of that amount or not,) purchase the railway on behalf of her Majesty, at a rate to be fixed, in case of disagreement, by arbitration. By the same Act, also, all railway companies are prohibited from raising loans for the future, on negotiable securities, except as authorized by parliamentary enactment (*f*); and by 8 & 9 Vict. c. 16, ss. 38—55, a variety of regulations are made in regard to the case of their borrowing money on bond or mortgage (*g*).

III. *Conveyances by water.*

The class of legislative provisions that require to be noticed under this head, are those which relate to the carriage of passengers in merchant vessels (*h*).

(*f*) 7 & 8 Vict. c. 85, s. 19.

(*g*) As to the legal remedy on the mortgage debentures and bonds of railway and other companies, see Hart *v.* Eastern Union Railway Company, 7 Exch. 246; Bolckow *v.* Herne Bay Pier Company, 1 Q. B., N. S. 74; Vertue *v.* East Anglian Railway Company, 6 Railway Cases, 252; Prince *v.* Great Western Railway Company, 16 Mee. & W. 244; Shelford on Law of Railways, p. 157—161, 3rd ed. Besides the statutes referred to in the text, on the subject of railways, see also 9 & 10 Vict. c. 28, for facilitating the dissolution of certain railway companies; 13 & 14 Vict. c. 83, for facilitating the abandonment of certain railways; 12 & 13 Vict. c. xl. and 15 & 16 Vict. ch. c., as to the Railway Passengers' Assurance Company.

(*h*) There are also provisions as to boats and barges on the River Thames, but these being of a local character are not noticed in the text. See as to these, 2 & 3 Philip & Mary, c. 16; 7 & 8 Geo. 4, c. lxxv.; Jacob's Law Dictionary, "Watermen;" Queen *v.* Tibble, 4 Ell. & Bl. 888; Queen *v.* Edmonds, ibid. 993.

The enactments on this subject are, chiefly, the 17 & 18 Vict. c. 104, ss. 300—325, 354; and the 18 & 19 Vict. c. 119 (*i*).

By 17 & 18 Vict. c. 104, called "The Merchant Shipping Act, 1854," sect. 303—325, every "passenger steamer" (that is, "every British steamship carrying passengers to, "from, or between any place or places in the united "kingdom, excepting steam ferry boats working in chains, "commonly called steam bridges,") shall be surveyed and reported upon to the Board of Trade, at least twice in the year, and shall proceed on no voyage with passengers, unless the owner or master has received from the board a certificate applicable to the voyage, and showing that the provisions of the Act have been complied with; and if the person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master shall incur pecuniary penalties. Provisions are also made against various kinds of misconduct by the passengers; and, by sect. 354, the master of every ship carrying passengers between any place in the united kingdom, or the channel islands, and any other place so situate, shall, when navigating within the limits of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot; and if he fails to do so, shall incur a penalty not exceeding 100*l*.

The 18 & 19 Vict. c. 119, called "The Passengers' Act, 1855," extends generally (*k*) to every ship carrying more than thirty passengers from the united kingdom, to any place out of Europe, and not being within the Mediterranean; and to every such colonial voyage as therein

(*i*) Of the previous acts on this subject, the 4 Geo. 4, c. 88 & 14 & 15 Vict. c. 79, were repealed by 17 & 18 Vict. c. 120, sched.; and the 15 & 16 Vict. c. 44, by 18 & 19 Vict. c. 119, s. 1. The 16 & 17 Vict. c. 84, as to passages between Ceylon and certain parts of the East Indies,—and 18 & 19 Vict. c. 104, called "The Chinese Passengers' Act, 1855," are still in force.

(*k*) 18 & 19 Vict. c. 119, ss. 3, 4; see the exceptions, ibid.

described. It commits the execution of its provisions to "the Emigration Commissioners" (*l*); or, in her Majesty's possessions abroad, to the emigration officers there appointed; or where there is none, or in their absence, to the chief officer of customs there (*m*). It provides that no "passenger ship" (that is, no such ship as above described) shall clear out to sea, until duly surveyed and reported seaworthy, nor until the master shall have obtained, from the emigration authority at the port of clearance, a certificate that the requirements of the Act have been duly complied with, and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed; nor until the master shall have joined in a bond to the crown in the sum of 2,000*l.* conditioned, *inter alia*, for the seaworthiness of the vessel (*n*). The Act also makes a great variety of regulations, calculated to limit the number, and to ensure the safety and accommodation of the passengers, but too numerous and too specific in their nature to be conveniently detailed on the present occasion (*o*); and with respect to colonial voyages, (that is, voyages of more than four hundred miles, or three days, from any place within any of her Majesty's possessions abroad, except the East India Company's territories and Hong Kong,) extends to them the general provisions which it contains; subject, however, to considerable variations, such as the nature of the case requires (*p*). It enacts also, that the master of every ship bringing passengers into the united kingdom, from any place out of Europe, and not

(*l*) Sect. 6. These commissioners are persons appointed by warrant dated 27th November, 1847, under the style of "The Colonial Land and Emigration Commissioners," to be during her Majesty's pleasure commissioners in the united kingdom for sale of the waste lands of the crown of her Majesty's colonies, and for superintending the emigration of the poorer classes of her Majesty's subjects to such colonies.

(*m*) 18 & 19 Vict. c. 119, ss. 8, 9.

(*n*) Sects. 11, 12, 19.

(*o*) Sects. 13—94.

(*p*) Sects. 95, 99.

within the Mediterranean sea, shall within twenty-four hours after arrival, deliver to the emigration authority, a correct list, under his signature, specifying the names, ages and callings of all the passengers embarked, and the ports from whence they came; and which of them (if any) have died, (with the supposed cause of death,) or have been born, during the voyage; and, if he fail to deliver such list or it be wilfully false, shall incur a penalty not exceeding 50*l.* (*q*). And further, that if any ship, bringing passengers *into* the united kingdom from any place out of Europe, shall have on board a greater number of passengers or persons than in the proportions respectively comprised in that Act, for carrying passengers *from* the united kingdom, he shall be liable to such pecuniary penalties as therein particularly set forth (*r*).

(*q*) 18 & 19 Vict. c. 119, s. 100.

(*r*) Sect. 101.

CHAPTER XI.

OF THE LAWS RELATING TO THE PRESS.

The law of property in books and other publications has been already discussed under the head of copyright, in that part of the present work in which the right to that species of property fell under consideration (*a*). Our attention will now be directed to the law which relates to the *means* of publication—in other words, to the press.

This mighty engine for good or for evil is one that in its nature requires to be kept under some restraint, while it is perhaps even yet more essential that the restraint should not be carried so far as to preclude a reasonable liberty of discussion. In this country no censorship is exercised over the press: yet its excesses are held in check by restrictive provisions, the general object of which is to ascertain in every instance by whom publications are printed; so as to make such publisher amenable, whenever the case so requires, to the civil remedy of injured parties, or to the correction of criminal justice (*b*).

The nature of these provisions will appear on an examination,—first, of those statutes which bear upon printing in general,—secondly, of those which relate to particular species of publication.

(*a*) Vide sup. vol. II. p. 34.

(*b*) It may be remarked here that the offence of libel may be prosecuted either by *indictment* or *information*, as we shall have occasion hereafter to explain (vide post, bk. V. c. VIII.); but, as regards *defamatory* libels, an information will not be granted unless the person applying for leave to file the same, makes an affidavit pointedly asserting his innocence of the charge. (4 Bl. Com. 451, n. by Christian.)

I. As to printing in general.

The regulations which concern this subject are to be found in the statute 39 Geo. III. c. 79, amended by 51 Geo. III. c. 65, and by 2 & 3 Vict. c. 12 (*c*). The necessity for them was originally suggested (as the Act first mentioned sets forth) by the multitude of writings of an irreligious, treasonable and seditious nature, which had latterly been published by certain societies: the substance of their enactments is as follows:—

Every person who possesses any printing-press or types for printing, must, by the 39 Geo. III. c. 79, deliver notice thereof (attested by one witness) to the clerk of the peace of the county or other division where the same is intended to be used, according to the form in the schedule to the Act annexed: and that officer is required to file such notice, and transmit an attested copy thereof to one of the principal secretaries of state; and must also give to the possessor of the printing-press a certificate in such form as the Act specifies (*d*), expressing that such notice has been delivered. A similar notice is to be delivered to the clerk of the peace by any person who intends to carry on the business of a letter-founder or printing-press maker; and a similar certificate must be obtained (*e*). And every person who shall keep or use any printing-press or types, or make or sell any type for printing or printing-press, without having given such notice and obtained such certificate, shall forfeit 20*l*. But an exception is made in favour of the royal printers, and of the public presses of the Universities of Cambridge and Oxford.

It is also provided by the same Act, under the like penalty, that every person, who shall sell types for printing

(*c*) See also the acts 39 & 40 Geo. 3, c. 95, and 41 Geo. 3, c. 80, to indemnify persons who had printed papers by order of public authorities, without complying with the regulations of 39 Geo. 3, c. 79; also 6 & 7 Will. 4, c. 66, amended by 8 & 9 Vict. c. 74, as to printing or publishing advertisements of *lotteries*.

(*d*) 39 Geo. 3, c. 79, s. 23.

(*e*) Sect. 25.

or printing presses, shall keep a fair account in writing, of all persons to whom they shall be sold, and produce such account to any justice of the peace who shall require the same (*f*): and that every person who shall print any paper for hire or reward shall carefully preserve one copy of it at least; and shall write on the same, in fair and legible characters, the name and place of abode of the person or persons by whom he shall have been employed to print the same; and produce the copy to any justice of the peace who, within six calendar months, shall demand a sight thereof (*g*).

And it is further enacted, that if any justice of the peace shall, from information upon oath, have reason to suspect that any printing-press or types for printing are used or kept for use, without notice given and certificate obtained as required by the Act; or in any place not included in the notice and certificate; he may, by warrant under his hand and seal, direct any peace officer in the day time to enter such place, and seize and carry away every printing-press found therein, together with the types and other articles thereto belonging, as well as all printed papers (*h*).

It is moreover provided by the last of the statutes above enumerated (repealing a clause to the same general effect contained in the 39 Geo. III. c. 79), that every person who shall print any paper or book whatsoever, which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper (if the same be printed upon one side only), or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his name and usual place of abode or business (*i*),—and every person who shall publish or disperse, or assist in publishing or dispersing, any paper or book printed with such unlawful omission,—shall for every copy so printed forfeit a sum not exceeding 5*l*. But no action or proceeding in any court or before any justice

(*f*) 39 Geo. 3, c. 79, s. 26.
(*g*) Sect. 29.
(*h*) Sect. 33.
(*i*) Bensley *v.* Bignold, 5 B. & A. 335; Marchant *v.* Evans, 2 Moore, 14.

of the peace shall be commenced, except in the name of the attorney-general or solicitor-general. And it is further enacted, that in the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.

There is also a clause to the effect that this and the preceding statutes shall be construed as one act of parliament; from which, and from certain enactments contained in these statutes, it follows that the provision with respect to the printer's name and place of abode extends not to any papers printed by the authority and for the use of either House of Parliament (*k*), or public board or office (*l*); or to the impression of any engraving, or the printing by letter-press of the name, or the name and address, or business or profession, of any person, and the articles in which he deals; and that it extends not to any papers for the sale of estates or goods by auction or otherwise; or to any bank note or security for payment of money, bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon; or to any receipt for money or goods; or to any proceedings in any court of law or equity;—notwithstanding the whole or any part of the said securities, instruments and matters aforesaid shall be printed (*m*).

II. As to particular species of publications.

And herein—1. As to *Newspapers.*—Shortly before the introduction of the regulations relative to printed books and papers in general, provisions of the same tendency had been devised by the legislature in reference to that highly influential class of publications just mentioned. But the

(*k*) 39 Geo. 3, c. 79, s. 28.

(*l*) 51 Geo. 3, c. 65, s. 3.

(*m*) 51 Geo. 3, c. 65, s. 3.

Act at that time passed (*n*) has been since repealed; and the provisions now in force for the control of newspapers are contained in 60 Geo. III. & 1 Geo. IV. c. 9; 11 Geo. IV. & 1 Will. IV. c. 73, and 6 & 7 Will. IV. c. 76.

By the first of these Acts, it is among other things provided, that no person, under a penalty of 20*l*., shall print or publish for sale any newspaper (*o*)—or any pamphlet or other paper containing any public news, intelligence or occurrence, or any remarks or observations thereon, or upon any matter in church and state;—which shall not exceed two sheets, or which shall be published for sale at a less price than 6*d*., until he shall have entered into a recognizance, if the printing be in London or Westminster, or into a bond, if in the country, together with two or three sufficient sureties, conditioned that the printer or publisher shall pay every such fine or penalty as may be at any time adjudged against him, for printing or publishing any blasphemous or seditious libel (*p*).

By the second of these Acts, the amount of such recognizances and bonds is fixed at 400*l*. or 300*l*. (as the case may be); and it is provided that they shall be made with such conditions as to secure the payment of any damages or costs to be recovered in actions for libels, as well as to secure the payment of fines or penalties upon convictions.

By the last of these Acts, (which relates in part to the *stamp duties* on newspapers (*q*), a subject not now under consideration,) it is enacted, among other things, that no person shall, under a penalty of 50*l*. *per diem*, print, or publish, or cause to be printed or published, any news-

(*n*) 38 Geo. 3, c. 78. This and the subsequent act, 5 Will. 4, c. 2, are repealed by 6 & 7 Will. 4, c. 76, s. 32.

(*o*) As to the definition of a newspaper within the meaning of these acts, see 60 Geo. 3 & 1 Geo. 4, c. 9, ss. 1, 2, 3, and 6 & 7 Will. 4, c. 76, s. 4. See also Attorney-General *v.* Bradbury, 7 Exch. 97.

(*p*) 60 Geo. 3 & 1 Geo. 4, c. 9, s. 8. As to the mode of enforcing these recognizances, see Ex parte Duke of Brunswick, 3 Exch. 829.

(*q*) See 18 & 19 Vict. c. 27, an act to amend the laws relating to the stamp duties on newspapers; and to provide for the transmission by post of printed periodical publications.

paper (*r*), (the London Gazette only excepted,) before there shall be delivered to the commissioners of stamps and taxes (now the board of inland revenue), or at the head office for stamps, or the proper officer for the district, a declaration in writing, containing the correct title of the newspaper—the true description of the house in which it is to be printed, and of that in which it is to be published,—and the true name, addition, and place of abode of every intended printer and publisher thereof, and (with certain qualifications) those of the proprietors (*s*): and it is also provided that every such declaration shall be signed by the printers and publishers therein specified, and by such of the proprietors therein specified as shall be resident within the united kingdom, and shall be renewed as often as changes in the concern shall occur; and that any false statement in such declaration as to the printers, publishers, or proprietors, shall be deemed a misdemeanor (*t*).

It is also enacted, that copies of such declarations, (certified as true copies,) shall be admitted in all proceedings, civil or criminal, and on all occasions touching such newspapers, as conclusive evidence, against the persons signing the same, of the truth of all matters therein set forth (*u*); and that the Board shall cause to be entered, in a book to be kept at the head office for stamps in Westminster, the title of every newspaper registered at the office, and also the names of the printers and publishers, as the same appear in the declarations; and that all persons shall have free liberty to inspect such book without fee or reward (*x*).

The printer or publisher of every newspaper shall, moreover, under a penalty of 20*l*., deliver at the ordinary price, at the head office for stamps, one copy of such newspaper as often as published, with the name and place of abode of

(*r*) See Ex parte Higginbotham, 9 Dowl. P. C. 200.

(*s*) See Holcroft *v.* Hoggins, 2 C. B. 488.

(*t*) 6 & 7 Will. 4, c. 76, s. 6. Vide Stephens *v.* Robinson, 2 Tyr. 280; Houstoun *v.* Mills, 1 M. & Rob. 325.

(*u*) 6 & 7 Will. 4, c. 76, s. 8.

(*x*) Sect. 10.

the printer or publisher written thereon in his proper hand, or by some person duly appointed to sign for him; and in case any person shall make application within two years afterwards, for the newspaper so signed, in order that it may be produced in evidence in any proceeding, civil or criminal,—the Board shall either deliver it to him, or cause it to be produced in court for that purpose (y).

There is an additional regulation, that at the end of every newspaper, and of every supplement sheet to the same, shall be printed the christian name and surname, addition and place of abode of the printer and publisher; and a true description of the house or building wherein the same is printed and published respectively, and the day of the week, month and year on which the same is published: and any person knowingly printing or publishing without these particulars, or with a false statement as to name, addition, place or day, or a description of place different from that in the declaration before mentioned, shall forfeit 20*l.* (z)

And it is further provided, that all penalties under this act, and that of 60 Geo. III. and 1 Geo. IV. abovementioned, may be sued for in the name of the attorney-general or solicitor-general, or the solicitor of the Board of Inland Revenue, or any officer of stamp duties, but by no other person whatever (a).

2. With respect to *Pamphlets*.

It is to be observed that all the above noticed provisions of 60 Geo. III. & 1 Geo. IV. c. 9, and of 11 Geo. IV. & 1 Will. IV. c. 73, apply not only to newspapers, but to any pamphlet or other paper containing any public news, intelligence or occurrence, or any remarks or observations thereon, or upon any matter in church or state, which shall not exceed two sheets, or which shall be published for sale at a less price than sixpence (b). And

(y) 6 & 7 Will. 4, c. 76, s. 13.

(z) Sect. 14.

(a) 60 Geo. 3 & 1 Geo. 4, c. 9; 6 & 7 Will. 4, c. 76, s. 27.

(b) See the sections of these acts cited supra. And see further provisions as to pamphlets, 60 Geo. 3 & 1 Geo. 4, c. 9, ss. 1—5.

also, that the above-mentioned act of 6 & 7 Will. IV. c. 76, applies not only to papers containing public news, but to those containing any remarks or observations thereon,—if printed in any part of the united kingdom for sale, and published periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two numbers,—where any of the numbers shall not exceed two sheets of twenty-one inches in length, and seventeen inches in breadth each, (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed); or where any shall be published for sale for a less sum than sixpence, exclusive of the duty by that Act imposed (*c*).

(*c*) Sect. 4, Sched. (A).

CHAPTER XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION AND ENTERTAINMENT.

UNDER this general head we shall comprise, I. The Laws relating to Public Houses. II. Those relating to Theatres. And as to the first of these, we may remark, that the statutes affecting public houses are of two kinds: the first having in view the subject of *revenue*, the other of *police*, —that is, the proper regulation of these places of public reception, and the prevention of the abuses to which they are naturally liable.

The statutes first referred to are those relative to the Excise, (a tax the general nature of which has been sufficiently noticed in a former volume (*a*)); and by one of these it is provided (*b*), that every person who shall sell beer, cider or perry by retail, to be drunk or consumed in his house or premises—and every retailer of spirits or of wine—who shall carry on his business without taking out an *excise licence* (*c*), (upon which the Act imposes a certain amount of duty,) shall for every such offence forfeit 50*l.*

The other description of Acts are those which relate properly to the licensing of publicans, (a system established by a variety of statutes, commencing with the reign of

(*a*) Vide sup. vol. II. p. 593.

(*b*) 6 Geo. 4, c. 81, s. 26. See also 6 Geo. 4, c. 80. As to what are "spirits" within the meaning of the excise acts, see Attorney-General *v.* Bailey, 16 Mee. & W. 74; Same *v.* Same, 1 Exch. 281.

(*c*) As to excise licences, see also 7 & 8 Geo. 4, c. 53; 4 & 5 Will. 4, c. 51; 4 & 5 Vict. c. 20.

Edward the sixth (*d*)); and of these the principal one now in force is 9 Geo. IV. c. 61, by which, in addition to the excise licence (*e*), publicans are required to obtain a *licence from the justices of the peace* of the county or place, authorizing them to sell in their public houses exciseable liquors by retail.

By this last-mentioned Act a penalty is imposed upon any person selling any exciseable liquor by retail, to be drunk or consumed in his house or premises, without being duly licensed so to do (*f*); and it is further provided, that no licence for the sale of exciseable liquors shall be granted to any person who has not previously obtained from the magistrates a licence under that Act (*g*);—from which provision, however, an exception is now introduced by a subsequent Act, in the case of beer, cider and perry, as we shall have occasion presently to explain.

For the purpose of granting these licences (*h*) (which are to be annually renewed (*i*)) to the keepers of inns, alehouses and victualling houses, the statute directs that there shall be holden a special session of the justices of the peace (to be called the General Annual Licensing Meeting) once in every year, in every division, county, riding, city, town or town corporate throughout England (*k*); and also, that from four to eight special sessions shall be held in each year for the purpose of transferring the licences (*l*), so granted, to other parties proposing to succeed to the same public houses; which last-mentioned jurisdiction may be likewise exercised at any petty sessions of the justices (*m*). Certain penalties also are provided by the Act, for offences

(*d*) See 5 & 6 Edw. 6, c. 25.

(*e*) See R. *v.* Drake, 6 Mau. & Sel. 116; R. *v.* Downes, 3 T. R. 560; 1 Wms. Burn, 29.

(*f*) 9 Geo. 4, c. 61, s. 18.

(*g*) Sect. 17.

(*h*) If a licence is refused, an appeal lies to the county quarter sessions. See R. *v.* Middlesex Justices, 3 B. & Adol. 938; Reg. *v.* Deane, 3 Q. B. 96; Queen *v.* Belton, 11 Q. B. 379; The Queen *v.* Cockburn, 4 Ell. & Bl. 265.

(*i*) 9 Geo. 4, c. 61, s. 13.

(*k*) Sect. 1.

(*l*) Bryant *v.* Beattie, 4 Bing. N. C. 254.

(*m*) 5 & 6 Vict. c. 44.

against the tenor of these licences, which bind the publican not to permit drunkenness or disorderly conduct or the like; and these penalties are generally made recoverable before two justices (*n*).

Such are the chief regulations in force, with respect to obtaining a licence for selling exciseable liquors at a house, kept as an inn, alehouse, or victualling house; but by an exception recently introduced into the system, this licence is not now required, if beer or cider (*o*) be the only liquors intended to be retailed; for by 11 Geo. IV. & 1 Will. IV. c. 64; 4 & 5 Will. IV. c. 85, and 3 & 4 Vict. c. 61 (commonly called "The Beer Acts"), various provisions have been made for giving greater facilities for the sale of these liquors, than was afforded by the former statutes.

By these Acts, every householder assessed to the poor rates, in any parish or place, (and not being a sheriff's officer, or officer employed to execute judicial process,) may, without any licence from the magistrates, apply for and obtain an excise licence, (on which a certain duty is payable, and which is duly registered and must be annually renewed,) to enable him to sell beer and cider (*p*),—or (on payment of a lower duty) an excise licence to sell cider only—by retail, at some house situate within such parish or place, and specified in such licence (*q*).

But in order to obtain such licence, the applicant must produce an overseer's certificate that he is the real resident, holder and occupier of such house, and rated to the poor

(*n*) We may take occasion to observe here, that by 14 Geo. 2, c. 40, s. 12 (commonly called the "Tippling Act"), no action can be maintained for any *debt* on account of spirituous liquors, unless the debt be *bonâ fide* contracted at one time, to the amount of one pound and upwards. See Hughes *v.* Done, 1 Q. B. 294; Lansdale *v.* Clarke, 1 Exch. 78.

(*o*) *Beer* is defined to include *ale and porter*, and *cider* to include *perry* (11 Geo. 4 & 1 Will. 4, c. 64, s. 32).

(*p*) 11 Geo. 4 & 1 Will. 4, c. 64, s. 30. As to this licence, see 3 & 4 Vict. c. 61, s. 5; 11 & 12 Vict. c. 49, s. 2; Reg. *v.* Charlesworth, 2 L. M. & P. 117; Queen v. Waghorn, 1 Ell. & Bl. 647.

(*q*) 11 Geo. 4 & 1 Will. 4, c. 64, ss. 1, 7; Leicester (Mayor) *v.* Burgess, 5 B. & Ad. 246.

rate in a certain amount (*r*); and must enter into a bond with one sufficient surety, in the penal sum of 20*l.*, or two sufficient sureties in the penal sum of 10*l.* each, for the payment of such penalties as he may incur under the acts (*s*): and if he is also desirous for permission that the liquor should be drunk *on the premises*, he must, moreover, annually deposit with the commissioners of excise (now the Board of Inland Revenue), or other person authorized to grant the licence, a certificate "of good character," signed by six rated inhabitants of the parish,—of whom none shall be maltsters, common brewers, or licensed publicans, or owners of licensed public houses (*t*).

No such certificate, however, is required, when the house to be licensed is situate in London or Westminster, or within the bills of mortality; or within any city or town corporate, or within one mile from the place used at the last election from any town to parliament, where the population of such city or town exceeds five thousand: and no licence, on the other hand, may be granted, even upon certificate, to sell in any such city or town, (whatever the population,) unless the house to be licensed is of the value of 10*l.* per annum (*u*).

It is moreover required, that every person obtaining a licence shall paint conspicuously over the door of his premises, in such form and manner as the Acts specify, his christian name and surname at full length, and the words "licensed to sell beer (or cider) by retail," with the addition of "to be drunk on the premises," or, "not to be drunk on the premises," as the case may happen to be (*x*). Penalties are also imposed (as in the case of inns and alehouses) on every retailer of beer or cider, who shall

(*r*) 3 & 4 Vict. c. 61, c. 2. It may be observed that there is no compulsion on the overseer to give this certificate. (The Queen *v.* Kensington, 12 Q. B. 654.)

(*s*) Sect. 4.

(*t*) 4 & 5 Will. 4, c. 85, s. 2.

(*u*) Ibid. s. 21.

(*x*) 11 Geo. 4 & 1 Will. 4, c. 64, s. 6; 4 & 5 Will. 4, c. 84, s. 18.

transgress, or allow to be transgressed, any of the conditions in his licence; and the penalties are generally recoverable before two justices.

By a subsequent statute also of 18 & 19 Vict. c. 118 (repealing 17 & 18 Vict. c. 79), it is provided, both as to licensed victuallers and persons licensed to sell beer by retail, and indeed as to all persons generally, that they shall open no house or place of public resort, for the sale of fermented or distilled liquors,—or sell such liquors therein (except to travellers or lodgers),—between the hours of three and five in the afternoon (or after eleven in the afternoon), on Sunday, Christmas Day, Good Friday, or any Fast or Thanksgiving Day, or before four in the morning of the day following.

II. The laws relating to theatres and other places of public amusement.

First, As to *theatres*.

The statute 6 & 7 Vict. c. 68, intituled "An Act for regulating Theatres," (after repealing the then existing enactments) (*z*) inflicts penalties upon any person who shall have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays (*a*), without the authority of letters-patent from the crown, or licence from the lord chamberlain of the household, or licence from at least four justices assembled at a special session, to be holden in the division where the proposed theatre is to be situate (*b*).

(*z*) There were enactments on this subject in 39 Eliz. c. 4; 3 Jac. 1, c. 21; 12 Ann. st. 2, c. 93; 10 Geo. 2, c. 28; 28 Geo. 3, c. 30.

(*a*) A "stage play" is defined by the act to include any tragedy, comedy, farce, opera, burletta, interlude, melo-drama, pantomime, or other entertainment of the stage, or any part thereof;—but not a theatrical representation in a booth or show duly allowed by the justice of the peace, or other person having authority in that behalf, at a fair or feast, &c. (6 & 7 Vict. c. 68, s. 23.)

(*b*) 6 & 7 Vict. c. 68, s. 2. By 2 & 3 Vict. c. 47, s. 46, the commissioners of police may authorize any

The jurisdiction of the lord chamberlain as to licensing, is defined by the Act as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster; and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark; and also within those places where the sovereign shall occasionally reside (*c*). The jurisdiction of the justices extends, generally, to all places beyond these limits (*d*): but it is provided, that no licence shall be granted by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being; who is to give security for the due observance of such regulations as the authorities may impose: and also that no licence shall be in force at the universities, or within fourteen miles thereof, without consent of the chancellor or vice-chancellor (*e*). Penalties are moreover imposed on any person who, for hire, acts, or causes to be acted, any part of a stage play, in any place not being a patent theatre or duly licensed (*f*).

The statute further empowers the justices to make suitable rules for ensuring order and decency in the theatres to be licensed by them, and for regulating the times when they are to be open; which rules may be rescinded or altered by a secretary of state: and in case of any riot or breach of rule in such theatre, the justices may order the same to be closed.

The lord chamberlain may also,—as to all theatres licensed by him, and also as to patent theatres,—order the same to be closed, in case of riot or any public occasion whatever: and it is provided, that one copy of every new stage play, and of every new act, scene or part,

superintendent, with constables, to enter any place used within the metropolitan police district for dramatic entertainment, and which is not a licensed theatre, and take into custody all persons found therein.

(*c*) 6 & 7 Vict. c. 68, s. 3.

(*d*) Sect. 5.

(*e*) Sect. 10.

(*f*) Sect. 11.

prologue or epilogue; or new addition to a prologue or epilogue, intended to be acted for hire at any theatre in Great Britain; shall be sent seven days previously to the lord chamberlain, for his allowance,—without which it shall not be lawful to act the same. The lord chamberlain is moreover empowered to forbid the representation or performance of any stage play, or any part thereof, in any theatre whatever, in any case where such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace; and it is enacted, that every person who shall, for hire, act or present, or cause to be acted or presented, any new stage play, act, scene, part, prologue, or epilogue, (or any part thereof,) until allowed by the lord chamberlain, or contrary to his prohibition, shall incur certain heavy pecuniary penalties; and the theatre shall also forfeit its licence.

Secondly, As to other places of amusement.

It is provided by 25 Geo. II. c. 36 (*g*), that every house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in London and Westminster, or within twenty miles thereof, without a licence from the last preceding Michaelmas quarter sessions,—shall be deemed a disorderly house; and the keeper thereof shall forfeit the sum of 100*l.*, and be otherwise punishable as the law directs in the case of disorderly houses (*h*). And it is further enacted, that over the door or entrance of all such licensed places, there shall be affixed and kept up the words "Licensed pursuant to act of par-

(*g*) This act, which at first was enacted only for three years, was made perpetual by 28 Geo. 2, c. 19, s. 1. The following are some of the cases which have arisen under its provisions:—Bellis *v.* Burghall, 2 Esp. 722; Clarke *v.* Searle, 4 Esp. 25; Archer *v.* Willingrice, ibid. 186; Shutt *v.* Lewis, 5 Esp. 128; Green *v.* Botheroyd, 3 Car. & P. 471; Gregory *v.* Tuffe, 6 Car. & P. 271; Gregory *v.* Tavernor, ibid. 281; Marks *v.* Benjamin, 5 Mee. & W. 565; Levy *v.* Yates, 8 A. & E. 129; Hall *v.* Green, 9 Exch. 247.

(*h*) 25 Geo. 2, c. 36, s. 2.

liament of the twenty-fifth of King George the second;" and that no house of this description is to be opened for the purpose of amusement before five o'clock in the afternoon (*i*).

But this Act has no application to the Theatres Royal in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket; nor to any patent theatre, or theatre licensed by the lord chamberlain of the household (*k*).

(*i*) 25 Geo. 2, c. 36, s. 3.

(*k*) Sect. 4.

CHAPTER XIII.

OF THE LAWS RELATING TO PROFESSIONS.



In most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, form a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications; but there are professions productive of evils so serious or irremediable, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it reasonable to subject them to the restraints of legal regulation. Those which our law deems to be of that character, (or those at least which have especially attracted the notice of our legislature as such,) are the professions of physicians, surgeons, and apothecaries; and of attornies and solicitors (*a*).

I. As to physicians, surgeons, and apothecaries: and herein,

1. As to *physicians.* The necessity of placing under supervision the practitioners of physic and surgery appears from our statute book to have been acknowledged long ago; for we find, in the third year of Henry the eighth (*b*), a statute, intituled "An Act for the appointing of Physicians and Surgeons," in which, after reciting the inconveniences and "grievous hurt, damage, and destruction of many of the king's liege people," forasmuch as "common artificers, as smiths, weavers, and women, boldly take upon them

(*a*) As to *barristers,* vide sup. vol. I. pp. 19, 20; et post, bk. v. c. III.
(*b*) C. 11.

great cures, in which they partly use sorcery and witchcraft," it is enacted, that no person within London, or seven miles thereof, shall practise as a physician or surgeon without examination and licence of the bishop of London or of the Dean of Paul's, duly assisted by the faculty; or beyond these limits, without licence from the bishop of the diocese, or his vicar general, similarly assisted. There is a saving, however, of the privilege of the universities of Cambridge and Oxford.

Five years afterwards, during the reign of the same monarch, a royal charter, dated the 23rd of September, in the tenth year of Henry the eighth, was granted for erecting a corporation of physicians in London; by which the above-mentioned superintendence of the bishops, so far at least as related to that profession, would seem to have been taken away.

By the statute 14 & 15 Hen. VIII. c. 5, this charter was confirmed; and in virtue of such act and charter a perpetual college of physicians was established, with a constitution of eight *elects*, to be renewed as need should require, of whom one was to be annually elected president; and it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, "as also their medicines and receipts," so that such as offended should be punished with fines, imprisonment, or other means; and that no person should be at liberty to practise within that circle, except by the licence of the college, under the penalty of 5*l.* per month. All persons were likewise forbidden to practise even beyond that circle, unless they should have been first examined and approved by the president and three elects; or should be graduates of Cambridge or Oxford.

Afterwards, by 32 Hen. VIII. c. 40, it was further provided, that any of the said company or fellowship of physicians being admitted by the said president and fellowship, might, from time to time, as well within London as else-

where, practise *surgery*, as part of the general science of physic, any law to the contrary notwithstanding.

The charter of the college was subsequently confirmed and enlarged by the act of 1 Mar. sess. 2, c. 9, and by certain other charters of later dates, viz. the 8th of October, in the fifteenth year of James the first, and the 26th of March, in the fifteenth year of Charles the second,—by which many important privileges and immunities are further secured to that body (*c*).

By 17 & 18 Vict. c. 114, it is provided that every bachelor of medicine and doctor of medicine of the university of London shall, by virtue of his degree, and without the necessity of undergoing any further examination, or obtaining any further authority or licence, be entitled to practise physic as fully in all respects as may be done by any bachelor of medicine, or doctor of medicine, of either of the universities of Oxford and Cambridge. Provided, however, that the privileges thereby conferred shall not be construed so as to extend to the practice of surgery, pharmacy, or midwifery.

2. As to *surgeons*. It will be seen that the first of the statutes we have cited, viz. 3 Hen. VIII. c. 11, expressly includes this class of practitioners within its provisions. In the same reign surgeons were again regulated by the statute 32 Hen. VIII. c. 42; which, after reciting that in London there were then two distinct companies of surgeons, the one called the *barbers of London*, and the other the *surgeons of London*, the first incorporated by King Edward the fourth, the second not incorporated,—united these companies together into one body corporate, called "The Masters or Governors of the Mystery and Commonalty of Barbers and Surgeons of London," and

(*c*) The following are some of the cases in which questions respecting the privileges of the college of physicians have arisen:—R. *v.* Askew, 4 Burr. 2186; Rose *v.* Physicians' College (in error), 5 Bro. P. C. 553; R. *v.* Physicians' College, 7 T. R. 282; Moises *v.* Thornton, 8 T. R. 303; Collins *v.* Carnegie, 1 Ad. & El. 695.

allowed them (among other privileges) to take yearly, for the purposes of anatomy, the bodies of four persons, out of those executed for felony.

Afterwards, by the statute 34 & 35 Hen. VIII. c. 8, notice is again taken of the surgical profession, but of a kind by no means complimentary; for it is recited, that the surgeons admitted by virtue of the antecedent act of the third year of Henry the eighth, though for the most part of small cunning, took great sums of money, and impaired their patients instead of doing them good; and it is consequently enacted, that it shall be lawful for all the king's subjects, having knowledge of the nature of herbs, roots, and waters, to minister to any outward disease; any thing in the act of the third year of Henry the eighth to the contrary notwithstanding.

The company of barbers and surgeons, however, still continued to subsist; and afterwards by a charter in their favour, dated the 15th of August, in the fifth year of Charles the first, all persons, (except such physicians as therein mentioned,) were prohibited from exercising surgery within London and Westminster, or within seven miles from London, for profit, unless they should be first examined by the company's examiners, and be therein duly admitted by the company (*d*). But at length, by statute 18 Geo. II. c. 15, the body compounded of the two callings of barber and surgeon, (so ill assorted according to our modern notions,) was broken into two distinct corporations (*e*); those thereof who had been admitted to practise surgery being now constituted a body corporate, by the name of "The Master, Governors, and Commonalty of the Art and Science of Surgeons of London;" and at the same time authorized to choose governors, examiners, and other officers: and it was enacted, that it should for ever enjoy all the same privileges and franchises as the members of the former company, being admitted surgeons, could have enjoyed under the original act of union and the

(*d*) Preamble, 18 Geo. 2, c. 15. (*e*) Sharpe *v.* Law, 4 Burr. 2133.

several letters-patent. The letters-patent were again confirmed by charter, the 22nd of March, in the fortieth year of George the third, re-incorporating the company by the style of "The Royal College of Surgeons, in London," and again by charter, the 14th of September, in the seventh year of Victoria, when it received the appellation of "The Royal College of Surgeons of England." The charter last mentioned, recites that the college then consisted of members constituted such, either by the charter of the fortieth year of George the third, or by letters testimonial under the common seal of the college, as to the qualification of such members to practise the art and science of surgery; and that the governing body of the college consisted of a council, some of whom were examiners for the college; and it proceeds to create a new class of members, called *fellows*, from whom and by whom the council are to be in future elected; and provides that all future examiners be elected by the council, and hold their office at pleasure of the council. The charter also contains a clause, that no bye-law or ordinance thereafter to be made by the council shall be of any force, until the royal approbation thereof shall have been signified to the college, under the hand of a principal secretary of state; or shall have been otherwise approved in such manner as parliament shall direct.

As to physicians and surgeons it is further to be observed, that the former cannot maintain an action for their fees, their employment (like that of a barrister) being of a merely honorary description (*f*); but surgeons are entitled to recover at law a reasonable compensation for their services (*g*). We have also to notice, in connexion with these

(*f*) Co. Litt. 265, n. See Chorley *v.* Bolcot, 4 T. R. 317; Little *v.* Oldaker, 1 Car. & M. 370; Butterby *v.* Lawrence, ibid. 277. *Secus*, where there is an actual contract, Veitch *v.* Russell, 3 Q. B. 928.

(*g*) See Lipscombe *v.* Holmes, 2 Camp. 441; Baxter *v.* Gray, 4 Scott, N. R. 374; Handley *v.* Henson, 4 C. & P. 110; Simpson *v.* Rolfe, 4 Tyr. 325; Richmond *v.* Coles, 1 Dowl. N. S. 560.

professions, the act 2 & 3 Will. IV. c. 75, intituled "An Act for regulating Schools of Anatomy;" by which it is provided, that the executor or other person having lawful possession of the body of a deceased person, and not being intrusted with it for interment only,—may permit the body of such person to undergo anatomical examination, unless in his lifetime he shall have expressed, in such manner as in the act provided, a wish to the contrary: or unless the surviving husband or wife, or other known relation of such person, shall otherwise require. And further, that the secretary of state for the home department may grant licences to practise anatomy, to any members of the college of physicians or surgeons, or to any graduates or licentiates in medicine, or any professor or teacher of anatomy, medicine or surgery, or any student attending any school of anatomy,—on application by such parties for the purpose, countersigned by two justices of the peace in such manner as the Act provides: and that it shall be lawful for persons so licensed to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted so to do by a person having lawful authority as aforesaid in that behalf. But no anatomical examination shall be lawful, unless conducted at some place, of which such secretary of state shall have had a week's notice, at a place where it is intended to practise anatomy; and the secretary of state is to appoint Inspectors for all such places, who are to make quarterly returns as to the subjects carried in for examination. By this Act also, together with some preceding statutes relating to the criminal law, all former provisions of that law, authorizing the dissection of offenders after execution, are repealed.

3. With respect to *apothecaries.*—The statute by which apothecaries are regulated is the 55 Geo. III. c. 194, which, after reciting (and for the most part confirming) a charter of James the first, by which the "Society of the Art and Mystery of Apothecaries of the City of London"

was incorporated,—proceeds to enact, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall have been examined by a court of examiners (to be chosen by the master and wardens of the said company, in such manner as the Act directs); and shall have received from such court a certificate of his being duly qualified to practise (*h*).

This certificate (for which a certain sum is to be paid, for the benefit of the company's funds,) is not to be granted to any person below the age of twenty-one, or who has not served an apprenticeship of five years to an apothecary, and can produce testimonials of sufficient medical education and good moral conduct; and any person practising without such certificate, is disabled from recovering his charges (*i*), and is moreover liable to a penalty of 20*l.* for every such offence (*j*).

It is also provided, that (inasmuch as it is the duty of every apothecary to prepare with exactness such medicines as may be directed for the sick, by any physician lawfully licensed), any apothecary refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order, signed with his initials, by any physician lawfully licensed, shall incur such penalties and forfeitures as therein set forth (*k*). And, further, that the master, wardens, and society of apothecaries for the time being,—or any persons by them appointed, and being not fewer than two, and properly qualified,—may

(*h*) 55 Geo. 3, c. 194, s. 14. As to what constitutes practice as an apothecary, see Apothecaries' Company *v.* Warburton, 3 B. & Ald. 40; Same *v.* Greenough, 1 Q. B. 799. As to the certificate, see Young *v.* Geiger, 6 C. B. 541. By 6 Geo. 4, c. 133, s. 4, every person holding a warrant as surgeon or assistant surgeon in the army or navy, may practise as an apothecary, without undergoing the examination or obtaining the certificate required by 55 Geo. 3, c. 194.

(*i*) 55 Geo. 3, c. 194, s. 21. See Young *v.* Geiger, 6 C. B. 541.

(*j*) See Brown *v.* Robinson, 1 Car. & P. 264; Apothecaries Company *v.* Greenwood, 2 B. & Adol. 709; Apothecaries' Company *v.* Burt, 5 Exch. 363.

(*k*) 55 Geo. 3, c. 199, s. 5.

at all reasonable times in the day time, enter the shops of any apothecaries throughout England and Wales, and search and examine whether the medicines and drugs be wholesome, and meet for the health of the subjects of the realm; and may destroy such as they find to be otherwise; and may report to the master and wardens of the society the names of the offenders: who are made liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*l*).

The Act contains, however, a proviso that nothing therein shall affect the business of a *chemist and druggist* (*m*), in the buying, preparing, compounding, dispensing (*n*), and vending, of drugs, medicines, and medicinable compounds, wholesale and retail (*o*): nor shall interfere with the rights of the universities of Cambridge or Oxford, the College of Physicians or of Surgeons, or the Society of Apothecaries respectively, except as altered by that Act (*p*).

(*l*) 55 Geo. 3, c. 194, s. 3.

(*m*) Sect. 28. See, as to this exception, The Apothecaries' Company *v.* Greenough, 1 Q. B. 799.

(*n*) As to the meaning of *dispensation* in pharmacy, see Apothecaries' Company *v.* Burt, 5 Exch. 363.

(*o*) By 14 & 15 Vict. c. 13, the sale of arsenic and arsenious preparations is subjected to restrictions. Particulars are to be entered by the vendor, and signed by the purchaser, of the day of sale, the name, abode, and condition of the purchaser, the quantity sold, and the purpose for which required. Where the purchaser is unknown to the vendor, the sale must be in the presence of a person known to the vendor, and to whom also the purchaser is known. The purchaser must be a person of full age; and the arsenic must be coloured with an admixture of indigo or soot, unless where represented by the purchaser to be required for some purpose for which it would be rendered unfit by such admixture; when it may be sold in a quantity of not less than ten pounds. But the act does not extend to arsenic forming part of the prescription of a member of the medical profession; or sold by wholesale, to retail dealers, upon orders in writing in the ordinary course.

(*p*) By 15 & 16 Vict. c. 56—reciting that a society had been formed and incorporated in 1843, called "The Pharmaceutical Society of Great Britain," and that it was expedient to prevent ignorant and incompetent persons from assuming the title of pharmaceutical chemists (or of members of that society),—it is provided that every person duly examined by the examiners of the society, and having obtained from them certificates of competency to practise as

II. As to *attornies and solicitors* (*q*).

The statutes relating to this branch of the legal profession, being very numerous and complicated, were amended and consolidated by 6 & 7 Vict. c. 73 (*r*), by which the previous enactments as to the qualification, admission, and regulation of attornies and solicitors are repealed.

By this statute it is enacted, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on, solicit or defend, any action or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales, unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as attorney or solicitor, either previously to, or else in pursuance of, that statute (*s*).

To entitle a person, for the future, to this admission, and enrolment, it is required, 1st, that he shall have served, (having been duly bound by contract in writing so to do,) with some practising attorney or solicitor in England or Wales, a clerkship of five years (*t*): or (if he shall have

pharmaceutical chemists, shall be entitled to be registered, and that none but persons so registered shall assume that title. And it is also enacted that the examinations shall not include the theory and practice of medicine, surgery, or midwifery, and that no member of the medical profession shall be entitled to be registered.

(*q*) As to attornies and solicitors, see also post, bk. v. c. III. As to *notaries public*, see 41 Geo. 3, c. 79; 6 & 7 Vict. c. 90; Queen *v.* Scriveners' Company, 3 Q. B. 939.

(*r*) As to how far 2 Geo. 2, c. 23, is repealed by this statute, see Hodge *v.* Bird, 6 Man. & G. 1020.

(*s*) A person who acts as an attorney without being properly qualified, is liable to be *indicted* for a misdemeanor. (Ex parte Buchanan, 8 Q. B. 833.) By 7 & 8 Vict. c. 101, s. 68, however, clerks and officers to boards of guardians, &c., under the Poor Laws, may commence or defend proceedings before magistrates in special or petty sessions, or out of sessions, without being so qualified. As to the admission of attornies and solicitors of *colonial* courts, into the courts of England, see 20 & 21 Vict. c. 39.

(*t*) 6 & 7 Vict. c. 73, ss. 2, 3. (See Ex parte Davies, 5 Q. B. 564; Ex parte Bateman, 6 Q. B. 853.) See

taken a degree, under such circumstances as in the Act mentioned, at Cambridge, Oxford, Dublin, Durham, or London) a clerkship of three years (*u*). And, 2ndly, that in addition and subsequently to such service, he be examined by, or by direction of, one or more of the judges at Westminster,—or (in the case of a solicitor) by the Master of the Rolls,—touching his articles, service, fitness and capacity to act.

For this purpose the judges, or any eight of them, including the three chiefs,—or (in the case of a solicitor) the Master of the Rolls,—may from time to time appoint examiners, and make such rules as to the examination as they may think proper (*x*); and the judges, (or Master of the Rolls, as the case may be,) upon being satisfied by such examination, or by the certificates of such examiners, of the competency of any candidate for admission, shall administer to him such oath as specified in the Act, viz., "that he will truly and honestly demean himself in practice," and also the oath of allegiance; and after such oaths shall cause him to be admitted as an attorney of the said courts of law at Westminster,—or as solicitor of the High Court of Chancery, as the case may be,—and his name to be enrolled as an attorney or solicitor of such courts; which admission shall be written on parchment, signed by such judges, (or Master of the Rolls,) and impressed with the proper stamps (*y*).

It is moreover enacted, that there shall be a *Registrar of attornies and solicitors*, whose duty it shall be to keep an alphabetical list or roll of all attornies and solicitors, and to issue certificates as to persons who have been duly ad-

9 Will. 3, c. 25, s. 59; 7 & 8 Vict. c. 86; 19 & 20 Vict. c. 81; Ex parte Williams, 26 L. J. (Q. B.) 167, as to the stamping and enrolment of the articles of clerkship.

(*u*) 6 & 7 Vict. c. 73, s. 7. By 14 & 15 Vict. c. 88, the same privilege is now granted in respect of degrees in the Queen's University, Ireland.

(*x*) 6 & 7 Vict. c. 73, ss. 16, 17, 18. See the present regulations, approved by the judges, H. T. 1858.

(*y*) 6 & 7 Vict. c. 73, ss. 15, 16.

mitted and enrolled; and the duties of this office are by the Act committed to the "Incorporated Law Society," until some person shall be appointed in their room (z).

Such a certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as an attorney or solicitor, before he can obtain the stamped certificate required by the Stamp Act, 55 Geo. III. c. 184 (a), authorizing him to practise for the ensuing year (b); and in order to obtain such Registrar's certificate, a declaration in writing, signed by the attorney desirous of practising, or by his partner, or in some cases by his London agent, containing his name and address, the courts of which he is an admitted attorney or solicitor, and the date of his admission, must be delivered to the Registrar (c). And if any attorney or solicitor shall practise in any of the courts aforesaid, without having obtained a stamped certificate for the current year, he shall be incapable of maintaining any action or suit to recover his fees or disbursements for business done under such circumstances (d).

The statute, we are considering, also contains the following regulations;—among others of less general interest:—

That no attorney or solicitor shall have more than two clerks, bound by contract in writing as aforesaid, at one and the same time; nor any such clerk after he shall have left off business, or while he himself acts as a clerk: and

(z) 6 & 7 Vict. c. 73, s. 21.

(a) As to the duty now payable for this certificate, see 16 & 17 Vict. c. 63, in schedule.

(b) 6 & 7 Vict. c. 73, s. 22.

(c) Sect. 23.

(d) 6 & 7 Vict. c. 73, s. 26. See Brunswick *v.* Crowl, 4 Exch. 492. Although *uncertificated*, an attorney may recover fees, &c., due for business not having reference to any suits or proceedings. (Richards *v.* Suffield, 2 Exch. 616; Greene *v.* Reece, 8 C. B. 88.) It may be observed that an attorney who neglects to procure or renew his certificate for one whole year, cannot afterwards procure one from the Registrar, or cause his original one to be renewed, without the order of a court or judge. As to this, see 6 & 7 Vict. c. 73, s. 25; Reg. Gen. H. T. 1853 (Attorneys).

that if he become bankrupt, or take the benefit of the Insolvent Act, or be imprisoned for debt for twenty-one days, the court may order his clerk to be discharged or assigned over to some other person (*e*).

That a person so bound as aforesaid as clerk for five years to an attorney, or solicitor, may serve one of those years as pupil with a practising barrister, or certificated special pleader, or with the London agent of the attorney or solicitor to whom he is bound (*f*).

That clerks whose masters have died or left off business during the term, or whose articles have been cancelled or discharged, may enter into new articles with other masters, which shall be available for the residue of the term (*g*).

That all persons admitted as attornies of one of the superior courts of law at Westminster may, upon production of a certificate thereof, be admitted in any other court of law in England or Wales, upon signing the roll of the same; and that persons admitted as solicitors in the High Court of Chancery may, in like manner, obtain their admission in all other courts of equity; and in the Court of Bankruptcy (*h*).

That no attorney or solicitor, who shall be a prisoner in any gaol or prison, may commence or defend any action, suit, or proceeding in law, equity, or bankruptcy; or maintain an action for fees for business done during such his confinement (*i*): and that no practising attorney or soli-

(*e*) 6 & 7 Vict. c. 73, ss. 4, 5.

(*f*) Sect. 6.

(*g*) Sect 13.

(*h*) Sect. 27. See as to *Welch* attornies, Ex parte Roberts, 6 Man. & G. 1049. See as to admission to practise in the Lord Mayor's Court, Queen *v.* Lord Mayor, &c. of London, 13 Q. B. 1. An attorney has, by the common law, the privilege of not being liable to be sued (generally), except in the court or courts to which he belongs. (See Gage's case, Hob. 177; Gardner *v.* Jessop, 2 Wils. 42; Lewis *v.* Kerr, 2 Mee. & W. 226; Walford *v.* Fleetwood, 14 Mee. & W. 449.) But this privilege will not exempt him from being sued in a county court, 12 & 13 Vict. c. 101, s. 18.

(*i*) 6 & 7 Vict. c. 73, s. 31.

citor shall be a justice of the peace in England or Wales, except in counties or towns corporate having justices by charter or otherwise (*k*).

And that no attorney or solicitor shall commence an action or suit for his fees or charges in respect of any business whatever, until after the expiration of one calendar month after a bill of his costs and charges, signed by such attorney or solicitor, shall have been delivered to the party to be charged (*l*): and such party may, on a proper application, obtain an order for referring such bill to be taxed (*m*); and for staying all proceedings to recover the amount thereof in the meantime. An order may also be obtained directing an attorney or solicitor to deliver his bill (when he has not done so); and also an order for his delivering up, upon payment of what is due, all deeds, papers and documents in his possession or power touching the business in such bill comprised (*n*).

It is provided, however, that the Act shall not extend to the examination, admission, rights, or privileges of any person appointed to be solicitor to the treasury, customs, excise, post-office, stamp duties, or any other branch of the revenue; or to be the solicitor of the city of London; or the assistant of the council for the affairs of the admiralty or navy; or the solicitor to the board of ordnance (*o*).

(*k*) 6 & 7 Vict. c. 73, s. 31.

(*l*) Sect. 37. As to the delivery of an attorney's bill, in compliance with this section, see the following recent cases: Cook *v.* Gilliard, 1 El. & Bl. 26; Cozens *v.* Graham, 12 C. B. 398; Pigot *v.* Cadman, 26 L. J. (Exch.) 134. As to its delivery when the party to be charged is a joint-stock company, see Blandy *v.* De Burgh, 6 C. B. 623.

(*m*) As to taxing bills for *agency* business, see Smith *v.* Dimes, 4 Exch. 32.

(*n*) 6 & 7 Vict. c. 73, s. 37. See Brooks *v.* Bockett, 9 Q. B. 847.

(*o*) 6 & 7 Vict. c. 73, s. 47.

CHAPTER XIV.

OF THE LAWS RELATING TO BANKS.

THE invention of banking appears to be due to the Republic of Venice. So early as the year 1171, Jews were accustomed to keep benches in the market place of that state for the exchange of money and bills; and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance.

In our own country, the business of banking appears to have been originally carried on by the goldsmiths; and accordingly we find it recited in an Act of the 22 & 23 Car. II. "that several persons, being goldsmiths and others, "by taking up or borrowing great sums of money, and "lending out the same for extraordinary hire and profit, "have gained and acquired to themselves the reputation "and name of bankers (*a*).

Afterwards, in the reign of William and Mary, the project was conceived, (in imitation, as it would seem, of the banks of Amsterdam and Genoa, already founded,) of establishing in England a national institution of the same description; and in 1694, parliament was accordingly prevailed upon, though with difficulty (owing to apprehensions then entertained of the policy of the measure,) to pass an Act sanctioning the creation of that great corporate body, which has since become so celebrated, under the denomination of "The Governor and Company of the Bank of England."

(*a*) See Jacob's Dict. in tit. Bankers.

Our present laws relative to banking apply either to the Bank of England,—or to certain establishments of a very recent origin, commonly denominated joint-stock banks,—or to private banks. In proceeding to give some account of the legal history of the first, we shall be led by necessary connexion to notice that of the two latter also.

The Act already referred to as the origin of the Bank of England, was the 5 W. & M. c. 20. It empowered their Majesties to receive voluntary subscriptions from any persons (native or foreign), or from any bodies corporate, to the amount of 1,200,000*l.*, to be paid into the Exchequer towards the prosecution of the war with France (*b*); and, by letters-patent under the Great Seal (which were in fact afterwards granted under date 27th July, 1694), to incorporate all such subscribers into a company, to be called "The Governor and Company of the Bank of England;" and such subscribers were to be paid, out of the duties to be levied under that Act, 100,000*l.* per annum (*c*). It was provided, however, that they should not borrow more than 1,200,000*l.*, so as to owe more than that sum at a time, unless upon such funds as should be agreed in parliament (*d*); and—that their Majesties' subjects might not be oppressed by the said corporation, by their monopolizing or "engrossing any sort of goods, wares, or merchandize," —they were prohibited from buying and selling goods (*e*). But the Act declared the Bank entitled, nevertheless, to deal in bills of exchange; or to buy and sell bullion, gold, or silver; or to sell any goods whatsoever, which should be left with it in pledge, and not redeemed at the time agreed upon, or within three months after; or to sell goods, the produce of lands which it should have purchased (*f*): and from the time of the passing of the

(*b*) 5 W. & M. c. 20, ss. 19, 41.

(*c*) Sects. 19, 20.

(*d*) Sect. 26.

(*e*) Sect. 27.

(*f*) Sect. 28.

Act, or soon afterwards, we find that the Bank began the practice, which it has ever since maintained, of issuing its own notes (*g*).

By subsequent Acts, its capital was progressively enlarged, and an exclusive privilege or monopoly established in its favour (*h*); for by one of these, 8 & 9 Will. III. c. 20, (explained by 15 Geo. II. c. 13, s. 5,) it was enacted, that no other bank, or company in the nature of a bank, should be allowed to be established by act of parliament within this kingdom (*i*): and by others, (viz. 6 Ann. c. 22 and 39 & 30 Geo. III. c. 28,) that it should not be lawful for any other corporation, or for more than six persons united in partnership, in England, to borrow, owe, or take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*k*). And though these exclusive privileges, (popularly called the Bank Charter,) have been since in part relinquished, they are also in part still extant, as we shall have occasion more particularly to explain in the course of the chapter.

Subject, however, to the Bank Charter, as from time to time modified, the trade of banking has, from its first introduction, been always free; and other banks, besides the Bank of England, have consequently been long established among us, and that both in London and the country; though as between the country and the London banks, the following distinction has practically obtained, that the former have usually carried on business, like the Bank of England, as *banks of issue*, that is, have made payments by their own notes; while, on the other hand, the latter have been *banks of mere deposit*, that is, have made pay-

(*g*) Vide Bank of England *v.* Anderson, 3 Bing. N. C. 653, 654.

(*h*) As to the Bank's exclusive privilege, vide Bank of England *v.* Anderson, 3 Bing. N. C. 653, 654; Booth *v.* Bank of England, 6 Bing. N. C. 415.

(*i*) 8 & 9 Will. 3, c. 20, s. 28.

(*k*) 6 Ann. c. 22, s. 9.

ments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England, and of its transactions, has always maintained, nevertheless, an importance far greater than that of any of these establishments: for while it has carried on the business ordinarily incident to banking,—such as receiving deposits of money, issuing its own paper, and discounting mercantile bills,—it has been also employed as a great engine of state, by receiving and paying the interest due to the public creditors (*l*), (for which it has received an allowance from the public (*m*);) by circulating exchequer bills; by accommodating the government with immediate advances, on the credit of distant funds; and by assisting generally in all the great operations of finance. Its advances to the government, however, are subject to the restrictions imposed by 59 Geo. III. c. 76, which enacts, in conformity with an early regulation (*n*), that it shall not be lawful for the Bank to advance or lend to the Crown any money whatever, upon the credit of any exchequer bill or treasury bill, or other government security, or in any other manner whatever, without the express and distinct authority of parliament for that purpose first obtained; but without prejudice to its right of purchasing any exchequer bills or government securities, then by law permitted; or to its advancing at the receipt of the Exchequer any money whatever, not exceeding in the whole the sum necessary to make good any deficiency in the Consolidated Fund (*o*) at the close of any quarter, upon the credit of exchequer bills, issued under the authority of the act 57 Geo. III. c. 48, or the act 59 Geo. III. c. 19.

In the year 1797, owing to a temporary failure in public credit, and a consequent run upon the Bank, it was

(*l*) As to the national debt, vide sup. vol. II. p. 582.

(*m*) As to this allowance, see 48 Geo. 3, c. 4, s. 6; 7 & 8 Vict. c. 32.

(*n*) 5 M. & W. c. 20, s. 30.

(*o*) Vide sup. vol. II. p. 587.

deemed necessary to restrain it for a limited period from making payments in cash; and an act of parliament, 37 Geo. III. c. 45, was passed in that year for the purpose, the provisions of which were continued, by subsequent acts (*p*), until the 1st of May, 1823, when the restriction ceased.

In the year 1826, the Bank consented to an arrangement (*q*), by which it was authorized, (so far as its already existing powers might be deemed inadequate to the purpose,) to extend the circulation of its paper, by establishing in country districts banks of its own; managed by its agents on the spot, and called *branches;* while on the other hand it relinquished in part its exclusive privileges; so as to admit, (within certain limits, and subject to certain conditions,) the introduction of other banking corporations,—and of banking companies not incorporated, even where the members of each of the latter exceeded six in number,—with power to issue bills or notes, though payable on demand, or at less time than six months from the borrowing: which corporations and companies have been since commonly denominated *joint-stock banks* (*r*).

Both these objects were carried into effect by the 7 Geo. IV. c. 46. As to branches of the Bank of England, it is provided, that it shall be lawful for the said governor and company to authorize any committee or agents to carry on banking in their behalf, at any place in England; and to give them the necessary powers of management and superintendence; and to issue to such agents, or their officers or servants, cash, bills, notes, and other securities: subject, however, to a proviso, that this power shall be

(*p*) 37 Geo. 3, c. 91; 38 Geo. 3, c. 1; 42 Geo. 3, c. 40; 43 Geo. 3, c. 18; 44 Geo. 3, c. 1; 54 Geo. 3, c. 99; 55 Geo. 3, c. 28; 56 Geo. 3, c. 40; 58 Geo. 3, c. 37; 59 Geo. 3, c. 49.

(*q*) Vide 7 Geo. 4, c. 46, ss. 1, 15.

(*r*) So called, also, in the title of 1 & 2 Vict. c. 96, and 7 & 8 Vict. c. 113, &c. As to joint-stock companies in general, vide sup. p. 140.

exercised in such manner, as may from time to time be appointed by bye-laws made at a general court; and, in default of such bye-laws, by the governor, deputy governor and directors, or the major part of them; and also to a proviso, that in any place where banking shall be so carried on, on behalf of the said governor and company, any promissory note, issued on the account in such place, shall be made payable in coin in such place as well as in London (*s*). In addition to which enactments, with respect to branch banks, it has been since provided by 3 & 4 Will. IV. c. 98, that after 1st August, 1834, all the Bank of England's promissory notes on demand, which shall be issued at any place in England out of London, where banking shall be carried on on behalf of the Bank of England,—shall be made payable at the place where such notes shall be issued. And further, that the Bank of England shall not be liable to pay, at a branch bank, any note of the Bank of England not made specially payable there; but, on the other hand, shall be bound to pay in London all notes, whether those of the Bank of England itself, or its branches (*t*).

As to the introduction of Joint Stock Banks, the same statute, 7 Geo. IV. c. 46, provided, that after the passing of that Act it should be lawful for any corporation erected for the purpose of banking,—or for any number of persons in co-partnership, though consisting of more than six,—to carry on the trade of bankers, in England: and to issue their bills or notes at any places in England exceeding sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding sixty-five miles from London, and not elsewhere. But it also required the names and places of abode of all the members of every such bank to be registered at the Stamp Office in London; and made each of its members

(*s*) 7 Geo. 4, c. 46, s. 15.

(*t*) 3 & 4 Will. 4, c. 98, ss. 4, 6.

severally liable to an execution for any of its debts, provided he were a member when the cause of action accrued, or at any subsequent period prior to the judgment; subject only to the further proviso that no execution should be issued after he had ceased to be a member for three years. At the same time, the Act bestowed on every such bank as was not incorporated, the privilege of suing and being sued in the name of a "public officer," appointed by itself for that purpose.

By the effect of this Act, banks may be considered as having become subject to the distribution referred to at the outset of the chapter,—that is, as consisting either of the *Bank of England* (including its *branches*), of *joint-stock banks*, or of *private banks;* by the last of which terms are to be understood all banking establishments distinct from the Bank of England, and not of such a nature as to require to be registered as joint-stock banks.

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705; but the period has been since from time to time enlarged by many successive acts of parliament (*x*). By one of these, already alluded to, the statute 3 & 4 Will. IV. c. 98, the former privileges are confirmed, subject to the modification they had received; but it is declared that any corporation or partnership, (though consisting of more than six,) may carry on banking in London, or within sixty-five miles thereof, provided that it do not borrow, owe, or take up, in England any money on their bills or notes payable on demand, or at less than six months from the borrowing. And the Act reserves a power to any corporation or partnership carrying on business beyond the radius of sixty-five miles,—and not having any house of business or

(*x*) See the following acts:—3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 4 Geo. 3, c. 25; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c. 28; 55 Geo. 3, c. 16; 56 Geo. 3, c. 96; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32.

establishment as bankers in London or within the radius,—to make and issue their bills and notes, payable on demand or otherwise, at the place where issued (being beyond the radius), and also in London; and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only (y). But it is provided that no such bill or note shall be for any sum less than 5*l.*, or be re-issued in London or within sixty-five miles thereof (z).

This Act also contains the following regulation: that after the 1st August, 1834, unless and until the legislature shall otherwise direct, tender of a note of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount therein expressed, for all sums above 5*l.*; so long as such bank shall continue to pay, on demand, their notes in legal coin: but subject to a proviso, that it shall not be a legal tender by the Bank itself or its branches (a).

Such was the history of the law relative to banks, prior to the passing of the act of 7 & 8 Vict. c. 32 (b), for further continuance of the Bank Charter. But by that statute great and extensive changes have been introduced. For it lays down a new system of regulation affecting not only the Bank of England, but all bankers whatever: its main object being to place the general circulation of the country upon a sounder footing; and to prevent as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed.

First, then, as to the *Bank of England.* This Act continues its charter or exclusive privilege (subject to the mo-

(y) 3 & 4 Will. 4, c. 98, s. 2. See also 3 & 4 Will. 4, c. 83.

(z) 3 & 4 Will. 4, c. 98, s. 1.

(a) Ibid. s. 6. As to tender, vide sup. vol. II. p. 531.

(b) Amended by 19 & 20 Vict. c. 20. See also 17 & 18 Vict. c. 83, s. 11, defining what shall be deemed *bank notes* within the meaning of 7 & 8 Vict. c. 32.

difications therein contained); but makes it determinable upon twelve months' notice to be given after 1st August, 1855, and upon repayment of certain debts therein particularized. It also provides, that the issue of its notes payable on demand shall hereafter be kept distinct from its general banking business: that it shall, on 31st August, 1844, transfer to its "issue department" securities to the value of 14,000,000*l.* (including the debt due to it by the public), and so much of the gold coin, and gold and silver (*c*) bullion, then held by it, as shall not be required by its banking department: that thereupon there shall be delivered out of the issue department into the banking department, such an amount of Bank of England notes as, together with those in circulation, shall be equal to the aggregate amount of the securities, coin, and bullion so transferred to the issue department: that the whole amount of its notes in circulation, (including those delivered to the banking department,) shall be deemed to be issued on the credit of such securities, coin, and bullion: that the amount of such securities shall not be increased, but may be diminished and again increased, so as not to exceed on the whole the sum of 14,000,000*l.*: and that, after such transfer as just mentioned to its issue department, it shall not be lawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. And further that an account of the notes issued by the issue department, and of the securities, gold coin and gold and silver bullion therein; and also of the capital stock and deposits, money and securities in the banking department;—shall be transmitted weekly to the commissioners of stamps and taxes, (now called the Board of

(*c*) The silver bullion is not to exceed one-fourth of the gold coin and bullion.

Inland Revenue,) in such form as the Act prescribes, and published by them in the London Gazette. And by the same statute it is also provided, that all persons shall be entitled to demand from the issue department of the Bank of England notes in exchange for gold bullion, at the rate of 3*l.* 17*s.* 9*d.* per ounce of standard gold (*d*).

As to *banks of issue* (other than the Bank of England): the Act provides, that in future it shall not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand: or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand,—except that it shall be lawful for any banker, who on the 6th May, 1844, was carrying on the business of a banker, and was then lawfully issuing his own notes, to continue to issue them. But if he become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect is at an end, and incapable of revival. It is also provided, that such banker shall not hereafter have in circulation a greater amount of notes, than the average amount which he had circulated before the Act; such average to be ascertained in such manner as the Act provides. And further, that if any such banker as last aforesaid shall cease to issue his own notes, it shall be lawful for her Majesty in council, upon application of the Bank of England, to authorize the Bank of England to increase the 14,000,000*l.* of securities in the issue department, in the proportion of two-thirds of the amount so withdrawn from circulation.

And lastly, as to *banks in general*, (other than the Bank of England,) it is provided by the same Act (*e*): that every

(*d*) 7 & 8 Vict. c. 32, s. 4. As to the standard, vide sup. vol. II. p. 532. By 7 & 8 Vict. c. 32, s. 7, the Bank of England is discharged from liability to stamp duty on their notes payable on demand. See, as to stamps on bankers' notes in general, 55 Geo. 3, c. 184; 9 Geo. 4, c. 23; 17 & 18 Vict. c. 83.

(*e*) 7 & 8 Vict. c. 32, s. 21.

banker shall, on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership; of the name of the firm; and of the place where the business is carried on: and the Board shall, on or before 1st March in every year, publish the same in some newspaper circulating either in the town or county.

It is also declared, that, for the future, it shall be lawful for all partnerships, (though exceeding six in number,) carrying on the business of banking in London, or within sixty-five miles thereof,—to draw, accept, or indorse bills of exchange not being payable to bearer on demand, anything in the act of 3 & 4 Will. IV. c. 98, to the contrary notwithstanding (*f*).

By another Act, 20 & 21 Vict. c. 49, ("The Joint Stock Banking Companies Act, 1857,") new provisions have been very recently made with respect to banking companies (*g*). It subjects them, generally, to the regulations of the Joint Stock Companies Acts, 1856, 1857 (*h*); but with proviso that no banking company, (whether existing or future,) shall be registered as a "*limited*" company. It provides also, that, notwithstanding any prior enactment to the contrary, it shall be lawful for any number of persons, not exceeding *ten*, to carry on the business of banking in partnership, in all respects as any company, if consisting of not more than *six*, could previously have done;—that any

(*f*) As to the recovery of penalties under the provisions of 7 & 8 Vict. c. 32, see 8 & 9 Vict. c. 76, s. 5.

(*g*) There had been a previous Act of 7 & 8 Vict. c. 113 (amended by 19 & 20 Vict. c. 100), for the regulation of all Joint Stock Banks formed on or after 6th May, 1844; with power for banks formed before that day, to petition her Majesty to be placed under its provisions,—which, as regards the separate liability of members, were similar in general to those of 7 Geo. 4, c. 46. But by 20 & 21 Vict. c. 49, s. 12, the 7 & 8 Vict. c. 113, is now repealed as to any banking company formed hereafter; or formed under the Act last mentioned, and registered under 20 & 21 Vict. c. 49.

(*h*) Vide sup. p. 140.

seven or more persons, associated for the purpose of banking, may register themselves as a company under that act; subject, however, to the conditions that the shares into which the capital is divided shall not be of less amount than 100*l.* each;—and that *unless* so registered, not more than ten persons shall, after the passing of that Act, form themselves into a partnership for banking, or carry on the business of banking (*i*).

(*i*) By an Act of the same session, 20 & 21 Vict. c. 54, bankers, &c., being intrusted for safe custody with property of another person, and, with intent to defraud, converting it to their own use, shall be guilty of a misdemeanor, and may be sentenced to penal servitude.

CHAPTER XV.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

THE registration of births, deaths, and marriages,—a practice so important in every country, for the authentication of the civil rights of individuals, and the promotion of many objects connected with the science of political economy,—has been but very recently introduced among us; though another species of registration, having reference to baptisms, burials, and marriages, had been long in use, and is, in regard to the two former ceremonies, still in force. It is to this more antient method, which, (as connected with the offices of the Church, and originally directed by the canon law,) may be termed the *ecclesiastical*, that we shall first advert; and our attention will next be directed to the new method of registering births, deaths and marriages, which may be termed, by way of distinction from the former, the *civil*.

I. As to the ecclesiastical mode of registration.

This system is said to be coeval with the Protestant Church; having been first established by Cromwell, Lord Vicegerent, in the thirtieth year of Henry the eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the first, still in force, and by several statutes, particularly 52 Geo. III. c. 146, further provisions were made for its regulation.

(*a*) Godolph. Abridg. 144.

(*b*) Canon 70, 1 Jac. 1, 1667.

This statute, so far as it relates to the registry of *marriages*, was repealed on the introduction of the civil method hereafter to be described; but still remains in force as regards *baptisms* and *burials* (*d*), and it provides, that registers of public and private baptisms and burials, solemnized according to the rites of the Established Church, in any parish or chapelry in England, shall be made (within seven days after the celebration of the same) (*e*) by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper; wherein such particulars shall be inscribed, and in such form and manner, as by the schedule, to the Act annexed, is set forth (*f*).

In cases where the baptism or burial is performed in any place other than the parish church or churchyard, by a clergyman not being the rector, vicar or curate of the parish, he must transmit on that or the following day a certificate that he has performed such ceremony, to the minister of the parish, who shall duly enter it among the parish registers (*g*).

The books wherein such entries are made are to be carefully preserved by the officiating minister in a dry well-painted iron chest; and are not to be removed therefrom except for the purpose of making such entries, or other such specific purposes as mentioned in the act (*h*).

An annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the Registrar of the diocese (*i*),

(*d*) 6 & 7 Will. 4, c. 86, s. 1. As to the registration of burials, in ground provided under the Burial Acts of 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; 18 & 19 Vict. cc. 79, 128; 20 & 21 Vict. c. 81,—see 16 & 17 Vict. c. 134, s. 8.

(*e*) 52 Geo. 3, c. 146, s. 3.

(*f*) Sect. 1.

(*g*) Sect. 4. It is enacted, by 20 & 21 Vict. c. 81, s. 16, that this provision shall not apply where the ceremony of burial is performed in ground provided under the above-mentioned Burial Acts.

(*h*) Sect. 5.

(*i*) The registrar of every vicar-

who is bound to make report to the bishop whether he has duly received such copy or not (*j*): and alphabetical lists of the entries are directed to be made out by the registrar; which are to be open to public search at reasonable times upon payment of certain fees (*k*).

It is further enacted, that any person who knowingly inserts any false entry into these registers or the certified copies, or who forges any part thereof, or wilfully destroys the same, or knowingly certifies any fraudulent or defective copy, shall be guilty of felony (*l*): and he is liable to penal servitude for fourteen years (*m*).

II. Of the civil system of registration.

The above is a succinct account of the ecclesiastical and more antient method of registration; but the entries thereby obtained were found in fact to be often both incomplete and inaccurate, and otherwise inadequate to the purposes designed,—being, (among other objections,) commemorative not of births and deaths generally, but only of such as are attended with the proper ceremonies of the church. Accordingly, on the 28th March, 1833, a committee of the House of Commons was appointed to consider and report upon "the general state of parochial registers, and the "laws relating to them, and on a general registration of "births, baptisms, deaths, and marriages in England and "Wales;" and the report of this body led to the introduction, (wholly independent of and co-existent with the method for registering baptisms and burials above mentioned,) of the system for registering ***births, marriages and deaths,*** which we are about to describe.

The statutes which contain the law upon this subject are the 6 & 7 Will. IV. c. 86 (considered as one Act with the

general or diocese has also, by 7 & 8 Vict. c. 68, s. 2, to transmit a yearly report of his fees, &c. to a principal secretary of state.

(*j*) Sects. 7, 8.

(*k*) 52 Geo. 3, c. 146. See Steele *v.* Williams, 8 Exch. 625.

(*l*) 7 & 8 Vict. c. 68, s. 14.

(*m*) Ibid. See 20 & 21 Vict. c. 3.

preceding chapter of the same year, intituled "An Act for Marriages in England" (*n*); and 7 Will. IV. & 1 Vict. c. 22.

By these Acts the guardians of every poor law union throughout England and Wales, (or the Poor Law Board, in the case of places not possessing a board of guardians (*o*),) are directed to divide the union or parish, of which they have the care, into as many districts as they shall think proper (subject, in case of a division by guardians, to the approval of the Registrar-general hereinafter mentioned),—each of which districts is to be called by a distinct name, and shall possess a *Registrar*, who shall be resident therein (*p*).

The Registrars of each union are subjected to the supervision of their "superintendent Registrar,"—an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-general (*q*).

These superintending registrars are in their turn subjected to the authority of an officer, to be appointed under the Great Seal,—and to hold office during the pleasure of the crown,—called "the Registrar-General of births, deaths, and marriages in England" (*r*); to whom, subject to such regulations as shall be made by a principal secretary of state (*s*), the general superintendence of the whole system, and the practical details (where no specific directions are given by the Acts), are entrusted.

Provision is also made by the Acts, for the establishment of a proper office, to be called the "General Register Office" (*t*); and register offices for each union (to be placed

(*n*) 6 & 7 Will. 4, c. 85, s. 44. As to this act, vide sup. vol. II. p. 257.

(*o*) 6 & 7 Will. 4, c. 86, s. 10. As to *extra-parochial* places, see 20 Vict. c. 19.

(*p*) Sects. 7, 10, 11, 16.

(*q*) Sect. 7.

(*r*) Sect. 2.

(*s*) Sect. 5.

(*t*) By 15 & 16 Vict. c. 25, this office may be established in any place or places, that may appear to the commissioners of the treasury to be fit and convenient.

under the respective Superintendents), for the preservation and safe custody of the registers when collected (u); and they also contain regulations as to the uniform construction and durable materials of the *books*, wherein the entries are to be made (x).

Such is an outline of the machinery of the system—the practical working out of which in the first instance depends, it will be seen, upon the *Registrars*.

Their duties are threefold.

1. As to *births*. Every Registrar is authorized and required to inform himself carefully, of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required by the schedule annexed to the 6 & 7 Will. IV. c. 86, to be registered touching such birth (y); and the father or mother of any child born,—or the occupier of any house in England wherein any child shall be born,—*may*, within forty-two days after the day of such birth, give notice thereof to the Registrar of the district (z); and within the same period, the father or mother of any child born in England—or, in case of their death or other inability, the occupier of the house—*shall*, (upon being requested so to do (a),) give information, to the best of his or her knowledge and belief, of the several particulars required to be known and registered touching the birth of such child (b).

After the expiration of the above-mentioned period of forty-two days, registration may still take place; but in this case a solemn declaration as to the truth of the particulars required must be made by the father or guardian, or some person present at the birth (c); and the entry of the birth must be signed not only by the Registrar but by the

(u) 6 & 7 Will. 4, c. 86, s. 9.
(x) Sect. 17.
(y) Sect. 18.
(z) Sect. 19.
(a) Upon pain of being liable to an indictment for a misdemeanor. R. v. Price, 11 Ad. & El. 727.
(b) 6 & 7 Will. 4, c. 86, s. 20.
(c) Sect. 22.

Superintendent Registrar; and a fee is payable to each of these officers by the person requiring the registry to be made (*d*). And after the expiration of six calendar months from the time of the birth, no registry thereof can upon any pretence be made,—except in the case of a child born at sea (*e*).

2ndly. As to *marriages.*—The forms as to the registration of marriages were incidentally described in a former part of the work, so far as to supersede the necessity of now recurring to them (*f*); and it therefore only remains to advert to the duties of the Registrar—

3rdly. As to *deaths.*—Every Registrar is authorized and required to inform himself carefully, of every death which shall happen in his district; and to learn and register, as soon after the event as conveniently may be done, such particulars concerning the same as in the schedule before mentioned contained (*g*); and the occupier of every house in England, in which any death shall happen, *may*, within five days after the day of such death, give notice thereof to the Registrar of the district (*h*); and some person present at the death, or in attendance during the last illness, of any person dying in England,—or in default of all such persons, the occupier of the house in which such death has happened, (or if the occupier be the person dying, then some inmate,) *shall*—within eight days after the day of the death—give information, (upon being requested so to do,) to the Registrar, according to the best of his or her knowledge and belief, touching such particulars as are required to be known and registered touching the death; and in the case of an inquest upon the body, such information is to be conveyed to the Registrar by the coroner before whom such inquest is held (*i*).

(*d*) 6 & 7 Will. 4, c. 86, s. 22.

(*e*) Sect. 23.

(*f*) Vide sup. vol. II. p. 268. By 19 & 20 Vict. c. 119, s. 15, the Registrar-general may appoint Registrars of Marriages.

(*g*) 6 & 7 Will. 4, c. 86, s. 18.

(*h*) Sect. 19.

(*i*) Sect. 25.

And it is further provided, that, four times in every year, each district Registrar shall deliver to his Superintendent, a certified copy of all the entries made by him (*k*),—and finally the register itself, upon the book being filled; and that the Superintendent, at the same intervals, shall transmit the same to the Registrar-general (*l*).

The duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging and indexing the certified copies so sent; and in compiling abstracts of their contents, to be transmitted once a year to a principal secretary of state: by whom such abstracts are afterwards to be laid before parliament (*m*).

The abstracts which have been in fact delivered by the Registrar-general, in pursuance of the duty last mentioned, are the more valuable from its having been required, (as a matter of official regulation,) that, in the registers of deaths, a medical statement in each instance of the *cause* of death should be annexed,—in addition to the particulars required by the statute. This part of the information obtained under the new system seems calculated to advance, in a very important degree, the interests of mankind; by furnishing accurate data, upon a large scale, to those who are engaged in nosological inquiries, or in endeavours to improve the sanatory condition of the labouring classes.

Before we conclude this chapter, we may remark, that, at the time of the introduction of the new system of registration, certain commissioners were appointed for inquiring into the state and authenticity of any registers (other than parochial) which at that time existed. This commission succeeded, in the course of a few years, in discovering about 7000 which were deemed authentic; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under

(*k*) 6 & 7 Will. 4, c. 86, s. 32.

(*l*) Sect. 34.

(*m*) Sect. 6.

the care of the Registrar-general,—together with records of the marriages and baptisms heretofore performed in the Fleet and King's Bench prisons, and at other irregular places. And the same statute provides, that all registers and records deposited in the General Register Office by virtue of that Act, except such registers as therein particularized of marriages and baptisms at the Fleet and elsewhere,—shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions of that Act (*n*).

(*n*) 3 & 4 Vict. c. 92, s. 6.

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF CIVIL INJURIES BY THE MERE ACT OF THE PARTIES.

At the opening of these Commentaries, the objects of municipal law were considered as consisting in the establishment and maintenance of the *rights* severally due to the different members of the community; rights having been previously defined as the liberties and advantages guaranteed, by the implied contract of society, to each individual, in return for his submission to those laws by which the same rights are secured to his fellow citizens (*a*). And this occasioned the distribution of our laws into two portions: one relating to *rights;* and the other to violation of rights, or (in more ordinary language) *wrongs.*

In the consideration of the first of these subjects, *rights* were distinguished into four kinds, viz. 1, Personal rights; 2, Rights of property; 3, Rights in private relations; 4, Public rights;—which have respectively formed the subject of the four preceding Books of these Commentaries: and we are now, therefore, to proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the

(*a*) Vide sup. vol. I. pp. 29, 135.

former, as right is the positive idea of which wrong is the mere privation; and the two subjects stand in the same connection with each other as *jus* with *injuria*, or *fas* with *nefas* (*b*).

Wrongs (as we had also occasion before to remark (*c*)) are divisible into two sorts; *civil injuries* and *crimes*. The former are the violations of private or public rights, when considered in reference to the injury sustained by the individual, and consequently as subjects for *civil redress* or *compensation;* the latter are the violations of private or public rights, when considered in reference to their evil tendency as regards the community at large, and accordingly visited with *punishment* (*d*). To investigate the first of these species of wrongs, with their legal remedies, or modes of redress, will be our employment in the present Book; and the other species will be reserved till the next or concluding volume.

[The more effectually to accomplish the redress of civil injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this volume will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature that some of them permit, and others require, a

(*b*) 3 Bl. Com. 2.

(*c*) Vide sup. vol. I. p. 138.

(*d*) According to Blackstone, "the "former are an infringement or pri-"vation of the private or civil rights "belonging to individuals, consi-"dered as individuals. The latter "are a breach and violation of pub-"lic rights and duties which affect "the whole community, considered "as a community." (3 Bl. Com. 2.) But there is an inaccuracy in this form of definition. It makes the difference depend on the nature of the right violated. But it is clear that a violation of the *same* right will sometimes amount to a civil injury, and sometimes to a crime,—as in the case of a battery.

[more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extra-judicial or eccentrical kind of remedy; of which we shall first of all treat, before we consider the several remedies by suit; and, to that end, shall distribute the redress of private wrongs into three several species; first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both of which we shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of peace which happens, is chargeable upon him only who began the affray (*e*). For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection,) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no pru-

(*e*) 2 Roll. Abr. 546; 1 Hawk. P. C. 131. But see Bac. Abr. Master and Servant (P.), where it is observed that on the master's right to defend the servant, there has been a difference of opinion.

[dential motives are strong enough to restrain. It considers, that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself (*f*); but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

II. *Recaption* or *reprisal* is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it

(*f*) 1 Hale, P. C. 485, 486.

[is provided, that this natural right of reception shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (*g*); but must have recourse to an action at law.

III. As reception is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands, when another person without any right has taken possession thereof.] In this case (which depends in some measure on like reasons with the former), [the party entitled may make a formal but peaceable entry (*h*) on the lands, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord; or he may enter on any part of it in the same county, declaring it to be in the name of the whole (*i*): but if it lies in different counties, he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or freeholders of Sussex. Also, if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*k*); for as their seisin is distinct, so also must be the act which divests that seisin.] But no entry can in the nature of things be made on hereditaments *incorporeal* (*l*);

(*g*) Higgins *v.* Andrews, 2 Roll. R. 55, 56; Masters and Powlie's case, ibid. 208; 2 Roll. Abr. 565, 566.

(*h*) As to the time within which an entry may be made, after the right of entry accrues, see 3 & 4 Will. 4, c. 27. Et vide post, bk. v. c. IX.

(*i*) Co. Litt. 417.

(*k*) Ibid. 252.

(*l*) 3 Bl. Com. 206.

and in every case where this remedy is available, it [must be pursued in a peaceable and easy manner; and not with force or strong hand (*m*). For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the antient possessor *in statu quo:* the criminal injury or public wrong, by breach of the king's peace, is punished by fine to the king.] For by 5 Rich. II. st. 1, c. 8, 15 Rich. II. c. 2, and 8 Hen. VI. c. 9, forcible entries are prohibited; [and by the last of these statutes, upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and upon force found, shall restore the possession to the party so put out: and in such case, or if any alienation be made to defraud the possessor of his right, (which is likewise declared to be absolutely void,) the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this, by a subsequent clause in the same statute, enforced by 31 Eliz. c. 11, does not extend to such as endeavour to keep possession *manu forti* after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim (*n*).]

IV. [A fourth species of remedy by the mere act of the party injured, is the *abatement*, or removal, of nuisances. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions (*o*). At present we shall only observe, that whatsoever unlawfully annoys or doth damage to another, is a nuisance: and such nuisance may be abated, that is,

(*m*) Newton *v.* Harland, 1 Man. & G. 644.

(*n*) As to forcible entry and detainer, see also 4 Inst. 176; 21 Jac. 1, c. 15; R. *v.* Wilson, 3 Ad. & El. 817; R. *v.* Harland, ibid. 826; Newton *v.* Harland, ubi sup.

(*o*) Vide post, bk. v. c. VIII.

[taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*p*);] nor occasion (in case of a *private* nuisance (*q*)) any damage, beyond what the removal of the inconvenience necessarily requires (*r*). [If a house or wall is erected so near to mine that it stops my antient lights, which is a *private* nuisance, I may enter my neighbour's land and peaceably pull it down (*s*);] or if the boughs of my neighbour's tree are allowed to grow so as to overhang my land, which they had not been accustomed to do, I may, on his refusal to remove such part of them as are in that position, effect the removal myself (*t*). [Or if a new gate be erected across the public highway, which is a *common* (or *public*) nuisance, any of the king's subjects passing that way may cut it down and destroy it (*u*). And the reason why the law allows this private and summary method of doing one's self justice is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distreining* cattle or goods for non-payment of rent or other duties: or, distreining another's cattle *damage feasant*, that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the trespass or damage.

(*p*) 5 Rep. 101; 9 Rep. 55; Houghton *v.* Butler, 4 T. R. 364.

(*q*) Lodie *v.* Arnold, 2 Salk. 458.

(*r*) Cooper *v.* Marshall, 1 Burr. 261.

(*s*) R. *v.* Rosewell, 2 Salk. 459.

(*t*) Norris *v.* Baker, 1 Roll. Rep. 394; Lodie *v.* Arnold, ubi sup. As to trees overhanging public ways, vide 5 & 6 Will. 4, c. 50, s. 65.

(*u*) James *v.* Hayward, Cro. Car. 184.

[As the law of distresses is a point of great use and consequence, it shall be considered with some minuteness: by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distreined; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

And, first, it is necessary to premise, that a distress (*x*), *districtio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury for which a distress may be taken, is that of non-payment of rent. It was observed in a former volume (*y*), that distresses were incident, by the common law, to every *rent service*, and, by particular reservation, to *rent charges* also;] and that by statute 4 Geo. II. c. 28, the same remedy was also extended in general to *rent seck*, *rents of assize*, and *chief rents*. [So that now we may lay it down as an universal principle that a distress may be taken for any kind of rent in arrear (*z*); the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*a*).] But as it is of the definition of rent, that its amount be certain or capable of being readily reduced by either party to certainty, so it is held that where the sum to be paid by the tenant is not fixed by agreement express or implied, but depends on what shall be considered as a reasonable compensation for

(*x*) The thing itself taken by this process, as well as the process itself, is in our law books very frequently called a *distress*.

(*y*) Vide sup. vol. I. pp. 673, 674.

(*z*) Vide Bradbury *v.* Wright, 2 Doug. 624; Newman *v.* Anderton, 2 N. R. 224; Buttery *v.* Robinson, 3 Bing. 392. Rent is said to be *in arrear* if it remain unpaid at any time after the expiration of the year, quarter, or other period, at which it may have been made payable. Thus in a *yearly* tenancy, and with absence of any express stipulation to the contrary, it is not in arrear till after the expiration of the year. (See Buckley *v.* Taylor, 2 T. R. 600; Collett *v.* Curling, 10 Q. B. 785.)

(*a*) As to distress by the executor of a lessor seised in fee, see 32 Hen. 8, c. 37; 3 & 4 Will. 4, c. 42, s. 37.

the use of the premises,—no distress for it can legally be made (*b*). 2. [For neglecting to do suit to the lord's court (*c*), or other certain personal service (*d*), the lord may distrein of common right. 3. For amercements in a court leet, a distress may be had of common right; but not for amercements in a court baron, without a special prescription to warrant it (*e*). 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds *damage feasant* (*f*); that is, doing him hurt or damage, by treading down his grass, or the like; in which case,] supposing the trespass not to be rendered excusable by the defective state of the fences, or the like (*g*), [the owner of the soil may distrein them,] while they so remain on his grounds, [till satisfaction be made him for the injury he has thereby sustained (*h*).]

[Secondly: as to the things which may be distreined, or taken in distress, we may lay it down as a general rule,

(*b*) Regnart *v.* Porter, 7 Bing. 451; Warner *v.* Potchett, 3 B. & Adol. 928; Dunk *v.* Hunter, 5 B. & A 322. As to the term within which a distress may be made after the right to distrain accrues, see 3 & 4 Will. 4, c. 27, ss. 2, 3, 42; James *v.* Salter, 2 Bing N. C. 505; 3 Bing. N. C. 544. As to distraining for an *apportioned* rent, vide Neale *v.* Mackenzie, 1 Mee. & W. 758; Revis *v.* Watson, 5 Mee. & W. 255. As to the extent of the remedy by distress in cases of bankruptcy and insolvency, and as against execution creditors, see 7 & 8 Vict. c. 96, ss. 18, 67; Phillips *v.* Shervill, 6 Q. B. 944.

(*c*) Bro. Abr. tit. Distress, 15.

(*d*) Co. Litt. 96; 2 Saund. by Wms. 168, n. (1).

(*e*) Brownl. 36.

(*f*) It seems that the common law right of distress for damage feasant is not confined to *cattle*, see Ambergate, &c. Railway Company *v.* Midland Railway Company, 2 Ell. & Bl. 793.

(*g*) 2 Saund. by Wms. 284 e, note (4).

(*h*) Besides these distresses, which are at the common law, there are others introduced for recovery of duties and penalties imposed by act of parliament, in special cases—as for the assessments made by commissioners of sewers (7 Ann. c. 10), or for the relief of the poor (43 Eliz. c. 21; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 49). Such distresses, being in the nature of executions (Hutchins *v.* Chambers, 1 Burr. 589), are usually attended with a power of *sale*.

[that all chattels personal are liable to be distreined, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distreinable, it will be easier to recount those which are not so, with the reason of their particular exemptions (*m*). And, 1. As every thing which is distreined is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property, (as dogs, cats, rabbits and all animals *feræ naturæ*,) cannot be distreined. Yet if deer, (which are *feræ naturæ*,) are kept in a private inclosure for the puspose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distreined for rent (*n*). 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress,] in order to prevent the danger, which might otherwise arise, of a breach of the peace (*o*); as an axe with which a man is cutting wood, or a horse while a man is riding him (*p*). [But horses drawing a cart may (cart and all) be distreined for rent in arrear.] 3. Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade (*q*), [shall not be liable to distress: as a horse standing in a smith's shop to be shoed, or in a common inn; or cloth in a tailor's house (*r*); or corn sent to a mill or market;] or goods sent to an auctioneer to be sold by him (*s*). [For all these are

(*m*) Co. Litt. 47.

(*n*) Davies *v.* Powel, C. B. Hil. 11 Geo. 2; Willes, 47.

(*o*) Storey *v.* Robinson, 6 T. R. 138; Co. Litt. 47.

(*p*) It is laid down by Blackstone, (vol. iii. p. 8,) on the authority of a case in 1 Sid. 440, that a horse may be distreined while his rider is upon him. But the contrary is the law; (Storey *v.* Robinson, ubi sup. And see Field *v.* Adames, 12 Ad. & El. 6[illegible])

(*q*) See Simpson *v.* Hartopp, Willes, 512; Gisbourn *v.* Hurst, 1 Salk. 250; 2 Saund. by Wms. 290, n. (*f*); 1 Smith's Leading Cases, 187; Muspratt *v.* Gregory, 3 Mee. & W. 677; Joule *v.* Jackson, 7 Mee. & W. 454; Gibson *v.* Ireson, 3 Q. B. 39; Finden *v.* M'Laren, 6 Q. B. 891.

(*r*) Read *v.* Burley, Cro. Eliz. 549.

(*s*) Brown *v.* Arundell, 10 C. B. 54; Williams *v.* Holmes, 8 Exch. 861.

[protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distreinable by him for rent (*t*): for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distreined, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they be put in by consent of the owner of the beasts, they are distreinable immediately afterwards for rent in arrear by the landlord. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distreinable immediately by the lessor, for his tenant's rent, as a punishment to the owner of the beasts, for the wrong committed through his negligence (*u*). But if the lands were not sufficiently fenced, so as to keep out cattle, the landlord cannot distrein them till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have laid down and risen up to feed; which in general is held to be one night at least (*x*); and then the law presumes, that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet if the lessor or his tenant were bound to repair the fences, and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are

(*t*) So held as to horses or carriages standing in a livery stable: see Francis *v.* Wyatt, 3 Burr. 1498; Crosier *v.* Tomkinson, 2 Ken. 439; Parsons *v.* Gingell, 4 C. B. 515.

(*u*) Co. Litt. 47.

(*x*) Gilb. Dist. by Hunt, 3rd edit. 47. As to levancy and couchancy, vide sup. vol. I. p. 652.

[not distreinable for rent till actual notice is given to the owner that they are there, and he neglects to remove them (*y*): for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*z*).] 4. Things in the custody of the law, such as property already taken *damage feasant* or in execution, are not distreinable (*a*). Nor, 5 (generally speaking), money; but it is otherwise should it be deposited in a *sealed bag* (*b*). 6. [Nothing shall be distreined for rent, which may not be rendered again in as good plight as when it was distreined (*c*): for which reason milk, fruit, and the like, cannot be distreined; a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distreined, because some damage must needs accrue in their removal; but a cart loaded with corn might, as that could be safely restored. But now, by statute 2 W. & M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distreined, as well as other chattels (*d*). 7. *Fixtures* (*e*), or

(*y*) Hemp *v.* Crewes, 2 Lutw. 1580.

(*z*) See Poole *v.* Longueville, 2 Saund. 289.

(*a*) Co. Litt. 47 a; Smith *v.* Russell, 3 Taunt. 400; Wright *v.* Dewes, 1 Ad. & Ell. 641. See also 56 Geo. 3, c. 50, s. 6. On the other hand, goods cannot be taken in execution unless the landlord be first paid his rent to the extent of one year's arrears (8 Ann. c. 14), or (if the tenancy be for a term less than a year), to the extent of the arrears of rent accruing during four such terms (7 & 8 Vict. c. 96, s. 67). And by 14 & 15 Vict. c. 25, s. 2, if the growing crops of a tenant be seized and sold in execution, such crops, so long as they remain on the lands, shall, in default of other sufficient distress, be liable to be distreined upon for rent becoming due after the seizure and sale. See also 19 & 20 Vict. c. 108, s. 75, as to the landlord's right to claim rent as against an execution under the warrant of a *county court*,—a case to which the provision of 8 Ann. c. 14, is inapplicable.

(*b*) Roll. Abr. 667; Vin. Abr. Dist. (H); Wilson *v.* Ducket, 2 Mod. 61.

(*c*) Darby *v.* Harris, 1 Q. B. 895; Morley *v.* Pincombe, 2 Exch. 101.

(*d*) Johnson *v.* Faulkner, 2 Q. B. 925.

(*e*) See Niblett *v.* Smith, 4 T. R. 504; Dalton *v.* Whittem, 3 Q. B. 961.

[things fixed to the freehold, may not be distreined; as, caldrons, windows, doors, and chimney-pieces; for they savour of the realty. For this reason also corn growing could not be distreined, till the statute 11 Geo. II. c. 19, empowered landlords to distrein corn, grass, or other products of the earth, and to cut and gather them when ripe (*f*).] Besides the preceding articles which are *absolutely* privileged, there are others which are privileged *sub modo*,—as, 8thly, beasts of the plough (*averia carucæ*) and sheep, and instruments of husbandry; and 9thly, the instruments of a man's trade or profession; for example, [the axe of a carpenter, the books of a scholar, and the like.] As to all which the rule is, that they are exempt from distress, provided there be other sufficient distress on the premises, but not otherwise (*g*).

Thirdly. Let us next consider [how distresses may be taken, disposed of, or avoided.] And in the course of the inquiry we shall find, that under this head, viz. in what relates to the manner of disposing of distresses, a very important innovation has been made, by modern statutes, upon the antient law. Formerly distresses [were looked upon in no other light], generally speaking, [than as a mere pledge, or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage feasant*, and for some other causes: over which the distreinor has no other power than to retain them till

(*f*) See Miller *v.* Green, 8 Bing. 92; Hutt *v.* Morrell, 16 L. J. (Q. B.), 240. Trees or shrubs in a nursery-ground are not within this statute. Clark *v.* Gaskarth, 8 Taunt. 431.

(*g*) Co. Litt. 47 a; 2 Inst. 132; Gorton *v.* Faulkner, 4 T. R. 565; Piggott *v.* Birtles, 1 Mee. & W. 441; in which cases it was held that, even though there be other sufficient distress, yet if it consist of growing crops, which are only distreinable by *statute*, the landlord may notwithstanding, distrein things privileged *sub modo*. And see Hutchins *v.* Chambers, 1 Burr. 589, where it was held that *averia carucæ* were distreinable for poor rate, even though there be other distress, on the principle that distress, under the 43 Eliz., is in effect an *execution*.

[satisfaction is made. But distresses for *rent* in arrear being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent,] many beneficial laws have, from time to time, been made for rendering the remedy in this case more perfect, and for allowing the thing taken to be *sold*.

[In pointing out the methods of distreining, we shall in general suppose the distress to be made for rent; and remark, where necessary, the difference between such distress, and one taken for other causes.

In the first place, then, all distresses must be made *by day* (*h*), unless in the case of *damage feasant;* an exception being there allowed, lest the beasts should escape before they are taken (*i*). And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now (*k*), if the tenant holds over, the landlord may distrein within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*l*). If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords.] And in general the distress must still be on the premises (*m*). [But now (*n*) the landlord may distrein any goods of his tenant, carried off the premises] fraudulently or [clandestinely, wherever he finds them, within thirty days after, unless they have been *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The

(*h*) 7 Rep. 7 a.

(*i*) Co. Litt. 142.

(*k*) Stat. 8 Ann. c. 14.

(*l*) As to what is a continuing possession, Taylerson *v.* Peters, 7 A. & E. 110.

(*m*) Buszard *v.* Capel, 8 Barn. & Cress. 141.

(*n*) Stat. 9 Ann. c. 14; 11 Geo. 2, c. 19; Angell *v.* Harrison, 17 L. J. (Q. B.), 25; Dibble *v.* Bowater, 2 Ell. & Bl. 564.

[landlord may also distrein,] for rent service (*o*), [the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises.] The landlord may not break open a house of which the rent is in arrear, to make a distress; for that is a breach of the peace (*p*). But when he is in the house he may break open an inner door; and (by 11 Geo. II. c. 19) if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, by the assistance of the peace officer of the parish, break open in the day time any place whither they have been so removed; [oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrein for an entire duty, he ought to distrein for the whole at once; and not for part at one time and part at another (*q*). But if he distrein for the whole, and there be not sufficient on the premises, or if he happen to mistake in the value of the thing distreined, and so take an insufficient distress, he may take a second distress to complete his remedy (*r*).

Distresses must be proportioned to the thing distreined for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man take a great or unreasonable distress, for rent in arrear, he shall be heavily amerced for the same. As if the landlord distrein two oxen for twelve pence rent; the taking of *both* is an unreasonable distress (*s*); but, if there were no other distress nearer the value to be found, he might reasonably have distreined *one* of them; and for homage or fealty, or suit and service, it is said that no distress can be excessive (*t*); for as these distresses cannot

(*o*) 11 Geo. 2, c. 19, s. 8. See Miller *v.* Green, 8 Bing. 92. As to rent service, vide sup. vol. I. p. 673.

(*p*) Co. Litt. 161; Comberb. 17; Brown *v.* Glenn, 16 Q. B. 254; Ryan *v.* Shiloch, 7 Exch. 72.

(*q*) 2 Lutw. 1582; Dawson *v.* Cropp, 1 C. B. 981.

(*r*) Cro. Eliz. 13; stat. 17 Car. 2, c. 7; Hutchins *v.* Chambers, 1 Burr. 590.

(*s*) 2 Inst. 107.

(*t*) Bro. Abr. tit. Assize, 291, Prerogative, 98.

[be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an ordinary action for the trespass is not maintainable upon this account, it being no injury at the common law (*x*).

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distreined must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue (*y*). But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law (*z*).] Accordingly by 2 W. & M. sess. 1, c. 5, an action on the case for treble damages will lie for illegally taking out of pound upon a distress for rent (*a*). And in case of distress *damage feasant*, it is enacted by 6 & 7 Vict. c. 30, that if any person shall release or attempt to release cattle lawfully seized by way of such distress, from the pound or place where they shall be impounded, or on the way to or from such pound or place, or shall destroy such pound or place, or any part thereof, or any lock or bolt thereof,—he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses; and in default may be committed to the house of correction, with hard labour,

(*x*) See 1 Ventr. 104; Fitzgib. 85; Fisher *v.* Algar, 2 C. & P. 374; Hutchins *v.* Chambers, 1 Burr. 590; Roden *v.* Eyton, 4 C. B. 427; Tancred *v.* Leyland, 16 Q. B. 669; Glynn *v.* Thomas, 11 Exch. 870.

(*y*) Co. Litt. 160, 161.

(*z*) Co. Litt. 47. It has been doubted whether rescue of goods distreined, or pound breach (if without breach of the peace), are indictable offences: but it seems that they are. (1 Russ. on Crimes, 411.)

(*a*) As to the remedy of the owner against a *third party* committing pound breach, see Turner *v.* Ford, 15 Mee. & W. 212.

for not more than three calendar months or less than fourteen days (*b*).

[A *pound* (*parcus*, which signifies any inclosure,) is either pound *overt*, that is, open overhead; or pound *covert*, that is, close. By the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distreining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hâc vice*, for securing of such distress (*c*).] If a live distress, of animals, be impounded, the onus of their support is thrown, by the legislature, upon the persons impounding the same. For, by 12 & 13 Vict. c. 92, ss. 5, 6 (*d*), the impounder is bound to supply them with sufficient food and water, upon penalty of twenty shillings for every refusal or neglect so to do, to be adjudged by a justice in a summary way. Any person, moreover, is authorized to enter a place where animals are impounded without sufficient food and water more than twelve hours, and supply them; without being liable to an action for such entry (*e*); and the costs of such food and water are to be paid by the owner of the animal, before it is removed, to the person who supplied the same. [A distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be

(*b*) By 6 & 7 Vict. c. 30, s. 2, however, the justices cannot hear any case in which a question of title to land arises, or any question as to a bankruptcy or insolvency, or execution, or the obligation to repair walls, &c.

(*c*) Vide Washborn *v.* Black, 11 East, 405, n. (*a*); Pitt *v.* Shew, 4 B. & Ald. 208; Swann *v.* Earl Falmouth, 8 Barn. & Cress. 456; Woods *v.* Durrant, 16 Mee. & W. 149.

(*d*) This statute repeals 5 & 6 Will. 4, c. 59.

(*e*) See Co. Litt. 47.

[impounded in a pound covert, else the distreinor must answer for the consequences (*g*).

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held (*h*), that the distreinor is not at liberty to work or use a distreined beast. And thus the law still continues with regard to beasts taken damage feasant, and distresses for suit or services; which must remain impounded till the owner makes satisfaction; or contests the right of distreining, by replevying the chattels,] a proceeding of which we shall presently say more.

[The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distreinor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law (*i*). And for an amercement imposed at a court leet, the lord may also sell the distress (*j*): partly because, being the king's court of record, its process partakes of the royal prerogative (*k*); but principally because it is in the nature of an execution to levy a legal debt.] And in modern times, it has been expressly provided, in like manner, by several acts of parliament (*l*), that in all cases of distress for rent, [if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him (*m*), replevy the same with sufficient security,] the distress may be appraised by two

(*g*) Mason *v.* Newland, 9 C. & P. 575; Wilder *v.* Speer, 8 A. & E. 547.

(*h*) Bagshawe *v.* Goward, Cro. Jac. 148.

(*i*) Bro. Abr. tit. Distress, 71.

(*j*) 8 Rep. 41.

(*k*) Bro. Abr. tit. Distress, 71; R. *v.* Speed, 12 Mod. 330.

(*l*) 2 W. & M. sess. 1, c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19. As to distresses for small rents, 57 Geo. 3, c. 93.

(*m*) This notice must be in writing. Wilson *v.* Nightingale, 8 Q. B. 1034.

sworn appraisers, and sold towards satisfaction of the rent and charges; the overplus, if any, being rendered to the owner himself (*n*). By such means therefore [a full and entire satisfaction may now be had for rent in arrear, by the mere act of the party himself, viz., by distress, the remedy given at common law,—and sale consequent thereon, which is added by act of parliament.]

As for the proceeding called a replevin, to which we just had occasion to refer, it will be sufficient for the present to state, that [to replevin (*replegiare*, that is, to take back the pledge, is when a person distreined upon,] (either for damage feasant, for suit and service, or for rent,) applies to the proper authority to interpose (*o*), and accordingly [has the distress returned into his own possession, upon giving good security to try the right of taking it, in a suit at law; and, if that be determined against him, to return the cattle or goods once more into the hands of the distreinor.] Replevin, however, and the course of proceeding which it involves, is a subject the fuller consideration of which will belong to a subsequent stage of this work (*p*), and which it will be unnecessary to pursue farther in this place. Enough has been stated to show its general nature and object, and that while it relieves the owner of the cattle or goods from the inconvenience of their being longer detained from him, during the time in which the right is still undecided, it answers, on the other hand, to the distreinor, [the same end as the distress itself, since the owner gives security to return the distress, if the right be determined against him.]

(*n*) See Jacob *v.* King, 5 Taunt. 451; Lyons *v.* Tomkies, 1 Mee. & W. 693; Knight *v.* Egerton, 7 Exch. 407. By 57 Geo. 3, c. 93, s. 6, every broker who makes a distress, in any case whatsoever, is to give a copy of his charges, &c. (Hart *v.* Leach, 1 Mee. & W. 560.)

(*o*) This application used to be made to the sheriff; it is by a recent enactment to be now made to the registrar of the county court for the district, 19 & 20 Vict. c. 108, ss. 63, 64.

(*p*) Vide post, bk. v. c. VIII. et c. XI.

Before we quit the consideration of distresses, it should be observed, that [the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any one irregularity was committed, it vitiated the whole, and made the distreinors trespassers *ab initio* (q).] But now, by the statute 11 Geo. II. c. 19, s. 19 (r), it is provided, that where any distress shall be made for any kind of rent justly due, and any subsequent unlawful act or irregularity be committed by the party distreining, the distress itself shall not therefore be deemed unlawful, or the parties making it trespassers *ab initio*; [but that the party grieved shall only have an action for the real damage sustained (s); and not even that, if tender of amends is made before any action is brought.

VI. The seizing of heriots (t), when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking cattle or goods in distress. As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrein for this, as well as seize: but for heriot-custom, (which Sir Edward Coke says (u) lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, but cannot distrein any other chattel for it (x). The like speedy and effectual remedy, of seizing, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, and the like; all which the persons entitled thereto may

(q) 1 Ventr. 37. As to the circumstances under which landlords distreining can be considered as trespassers, *ab initio*, see Six Carpenters' case, 8 Co. Rep. 146*b*; Evans *v.* Elliott, 5 Ad. & E. 142; West *v.* Nibbs, 4 C. B. 172.

(r) Vide Gambrell *v.* Earl of Falmouth, 5 Ad. & El. 403.

(s) See Harvey *v.* Pocock, 11 Mee. & W. 740; Rodgers *v.* Parker, 18 C. B. 112.

(t) As to heriots, vide sup. vol. I. p. 627.

(u) Co. Cop. s. 25.

(x) Odiham *v.* Smith, Cro. El. 590. Major *v.* Brandwood, Cro. Car. 260.

[seize, without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other, and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law, before any action could be brought.]

These are the several species of remedies which may be had by the mere act of the party injured. We shall next briefly mention such as arise from the joint act of all the parties together. And these are only two,—*accord* and *arbitration.*

1. *Accord* is an agreement, [between the party injuring and the party injured,] to make satisfaction; [which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action: but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*y*).] But it is to be observed under this head, first, that the action will not be taken away by mere accord without actual satisfaction. For example, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse;—for this would only be substituting one right of action for another. Secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain amount, does not answer to the legal idea of satisfaction. Thus, if a man owe 100*l.*, an accord or agreement between him and the creditor to pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice to bar the action on the original debt (*z*). But if any thing except money be taken in lieu

(*y*) 9 Rep. 79.

(*z*) Wright *v.* Acres, 6 A. & E. 726; Bayley *v.* Homan, 3 B. N. C. 920. As to the nature of an accord,

of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed the value of the thing so accepted.

II. [*Arbitration* (*b*) is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong (*c*), to the judgment of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire* (*imperator* or *impar* (*d*)), to whose sole judgment it is then referred: or frequently

see Wilkinson *v.* Byers, 1 A. & E. 106; Perry *v.* Attwood, 25 L. J.Q. B. 408. In an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with *one*. (Wallace *v.* Kelsall, 7 M. & W. 264.) As to an accord by a *stranger*, see Thurman *v.* Wild, 11 A. & E. 453; Jones *v.* Broadhurst, 9 C. B. 173.

(*b*) Under the head of arbitration, the cases in the books are extremely numerous. The following, of recent date, may be consulted with advantage. Doe *v.* Cox, 4 D. & L. 75; Griffiths *v.* Thomas, ibid. 109; Bottomby *v.* Buckley, ibid. 157; Spooner *v.* Payne, 4 C. B. 328; Tillam *v.* Copp, 5 C. B. 211; Toby *v.* Lovibond, ibid. 770; Leslie *v.* Richardson, 6 C. B. 378; Richardson *v.* Worsley, 5 Exch. 613; Wade *v.* Dowling, 4 Ell. & Bl. 44; Harrison *v.* Creswick, 13 C. B. 399. See also Watson on Awards, and Russell on Arbitration.

(*c*) This method of decision has been also authorized by statute, when questions arise as to rights of tithes and commons (6 & 7 Will. 4, c. 71; 8 & 9 Vict. c. 118); as to the amounts of compensation to be given for lands taken for undertakings of a public nature (8 & 9 Vict. c. 16), or for railways (8 & 9 Vict. c. 20), or for markets and fairs (10 & 11 Vict. c. 14), or for waterworks (c. 17), or harbours, docks and piers (c. 27), or improvements in towns (c. 34), or land drainage (c. 38), or cemeteries (c. 65). And even some criminal matters—not amounting to felony—may be thus disposed of; for example, an indictment for an ordinary assault (Elworthy *v.* Reid, 2 Sim. & Stu. 372), or for a nuisance (Dobson *v.* Groves, 6 Q. B. 637); but it is essential that the prosecutor should also have had a remedy by action (The Queen *v.* Hardey, 14 Q. B. 529; The Queen *v.* Blakemore, ibid. 544). See also the provisions of 12 & 13 Vict. c. 45, s. 12—15, allowing and facilitating, in certain cases, a reference to arbitration to determine controversies and disputes, for which the remedy would otherwise be only by appeal to the general or quarter sessions of the peace.

(*d*) Whart. Angl. Sacr. i. 772; Nichols. Scot. Hist. Libr. c. i. *prope finem.*

[there is only one arbitrator originally appointed (*e*). This decision, in any of these cases, must be in writing, and is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*f*). But the right of real property cannot thus pass by a mere award (*g*); which subtilty, in point of form (for it is now reduced to nothing else), had its rise from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration bond to refuse compliance (*h*). For though originally the submission to arbitration used to be,] and may still be, [by word or by deed, yet both of these being revocable in their nature, it became the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named,] or, in default thereof, to pay a certain penalty. [And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are difficult and almost impossible to be adjusted in a trial at law, the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought,—enacting by statute 9 & 10 Will. III. c. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree that their submission of the action or suit to arbitration or umpirage shall be made a rule of any of the courts of re-

(*e*) As to the appointment of arbitrators and of umpire, some new provisions will be found in 17 & 18 Vict. c. 125, ss. 12—14.

(*f*) Brownl. 55; 1 Freem. 410.

(*g*) 1 Roll. Abr. 242; Marks *v.* Marriott, 1 Ld. Ray. 115.

(*h*) See Doe *v.* Rosser, 3 East, 15; 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), s. 16.

[cord (*i*); and may insert such agreement in their submission or promise, or condition, of the arbitration bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive (*k*): and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside for corruption,] or undue means used in its procurement, [or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And in consequence of this statute, it is now become a considerable part of the business of the superior courts to set aside such awards, when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience of those rules and orders which are issued by the courts] in other cases (*l*).

The law on this subject has also been much improved by more recent enactments; it being provided by 3 & 4 Will. IV. c. 42, that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court; or appointed by any rule of court, or judge's order, or order of nisi prius, in any action; shall not be revocable by either party without leave of the court; and that the

(*i*) If the submission be not in *writing*, the case is not within the act, and cannot therefore be made a rule of court. —— *v.* Mills, 17 Ves. 419.

(*k*) By 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), s. 17, every agreement or submission to arbitration by consent, whether by deed or by instrument not under seal, may be made a rule of court *unless* an intention of the parties to the contrary appear thereby.

(*l*) As to the course of proceeding by attachment, to enforce an award, see Queen *v.* Hemsworth, 3 C. B. 745. It may be remarked here, that besides the proceeding by way of attachment, as for a contempt, an action may be brought on the award; and that where the award directs possession of land to be delivered to any party, or that any such party is entitled to the possession of such land, the court may order possession to be delivered to him accordingly, which shall have the effect of a judgment in ejectment. (17 & 18 Vict. c. 125, s. 16.

court or a judge may command the attendance of witnesses before the arbitrator, whose failure to attend shall be deemed a contempt of court; and, that if in any such submission, rule or order of reference, it shall be agreed or ordered that the witnesses shall be examined on oath, the arbitrator is required to administer such oath accordingly; and any such witness giving false evidence shall be deemed guilty of perjury. Moreover, by the 17 & 18 Vict. c. 125, called "The Common Law Procedure Act, 1854," provisions are made by which certain matters may be *compulsorily* remitted to this manner of decision. For by the 3rd section of that Act it is provided, that if it be made to appear at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly, or in part, of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for the court or judge, either to decide the matter in a summary way, or to order that the same be referred to an arbitrator appointed by the parties, or to an officer of the court, or (in country causes) to the judge of any county court, upon such terms as to costs and otherwise, as such court or judge shall think reasonable (*m*). And by the 6th section of the same statute, if upon the trial of any issue of fact, by a judge under that Act, without a jury (by consent of the parties (*n*)), it shall appear to him that the questions arising thereon involve matter of account which cannot conveniently be tried before him, he may at his discretion order such matter to be referred either to an arbitrator appointed by the parties, or to an officer of the court, or (in country causes) to the judge of a county court.

(*m*) It has been decided, that, where the matter in dispute consists in *part*, only of matters of mere account, or where some of the items of account are disputed, it may be compulsorily referred under this section (Brown *v.* Emerson, 17 C. B. 361); on the other hand it does not authorize a reference of all matters in difference, as well as the cause itself. (Kendil *v.* Merrett, 4 W. R., C. P. 594.)

(*n*) Vide post, c. x.

As to the effect of an award, when made, and not set aside by the court for invalidity, it is in general conclusive and final; and, upon an action or other proceeding to enforce it, no objection to its validity can be made, unless in respect of such defect as may happen to be apparent *on the face of the award itself*: the rule being that all *extrinsic* objections must be taken in the shape of an application to set the award aside (*o*); which application must be made before the last day of the term next after the award is made and published (*p*).

(*o*) See Braddick *v.* Thompson, 8 East, 344; Paull *v.* Paull, 2 Dowl. 340; Grazebrook *v.* Davis, 5 B. & C. 534; Macarthur *v.* Campbell, 2 Ad. & Ell. 52; Tillam *v.* Copp, 5 C. B. 211.

(*p*) 9 & 10 Will. 3, c. 15, s. 2. See Young *v.* Timmins, 1 Tyrw. 230, n.; Riccard *v.* Kingdon, 15 L. J. (Q. B.) 269; Gribble *v.* Buchanan, 18 C. B. 691. If the award be on a compulsory reference under 17 & 18 Vict. c. 125, the application to set it aside must be made within the first seven days of the term next after the award (sect. 9).

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

[The remedies for private wrongs, which are effected by the mere operation of the law, will fall within a very narrow compass, there being,] it is believed, [only two instances of this sort] capable of being suggested; [the one, that of *retainer*, where a creditor is made executor or administrator to his debtor; the other, in the case of what the law calls *remitter*.]

1. As to *retainer*. The law relating to executors and administrators has been already discussed in a former part of the work (*b*), where it appeared that [if a person indebted to another, makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree (*c*). This is a remedy by the mere act of law, and grounded upon this reason,—that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides.]

(*b*) Vide sup. vol. II. bk. II. c. VII.

(*c*) Ibid. p. 214; et vide 1 Roll. Abr. 922; Plowd. 543; Glaholm v. Rowntree, 6 A. & E. 710.

For every other creditor but himself is in a condition to commence an action, and obtain judgment for recovery of his debt. The effect, however, of this right of retainer (it will be observed) is to put him in some measure in a *better* position than others; because it enables him to obtain payment *first*, (among all creditors of equal degree,) and before any other has had time to commence an action. And this seems to illustrate a remark of Lord Bacon, that [the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (*d*).] But [the executor shall not retain his own debt in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion (*e*). Nor shall an executor of his own wrong be in any case permitted to retain (*f*).]

II. *Remitter* is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and of course defective, title; in this case he is remitted, or sent back, by operation of law, to his antient and more certain title (*g*). The possession which he hath gained by a bad title shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation

(*d*) Bac. Elem. c. 9.

(*e*) Vin. Abr. tit. Executors, D. 2.

(*f*) 5 Rep. 30.

(*g*) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. Ten. 129. As to the effect of the Statute of Uses in modifying the doctrine of *remitter*, vide 1 Saund. Uses, 166. As to remitter generally, Doe *v.* Woodroffe, 10 Mee. & W. 608.

or consent (*h*). As, if A. disseises B., that is, turns him out of possession, and afterwards demises the land to B. (without deed), for term of years, by which B. entereth; this entry is a remitter to B. (*i*), who is in of his former and surer estate. But if A. had demised to him for years by deed indented, or by matter of record, there B. would not have been remitted. For if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert (*k*).

[The reason given by Littleton (*l*), why this remedy, which operates silently and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy.] For as he himself is in possession of the land, there is no other person upon whom he can make entry (*m*).

[And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.]

(*h*) Co. Litt. 358; Wood *v.* Sir J. Sharley, Cro. Jac. 409.

(*i*) Litt. s. 695; Gilb. Ten. 129.

(*k*) Gilb. Ten. ubi sup.

(*l*) Litt. s. 661; Litt. by Butl. 347 b, n. (1).

(*m*) Blackstone treats of *remitter* as if it had no application except to the case where the disseisee was out of possession under such circumstances that he could only recover possession by *real action*. But it was also applicable (as it still is), to the case stated in the text, of his being out of possession, with right of recovering possession *by entry*. (Litt. s. 693; Gilb. Ten. 129; Co. Litt. by Butl. 347 b, n. (11).) And now, in consequence of that recent and important change of the law, by which real actions in general are abolished, (a subject to which we shall have occasion to refer more particularly hereafter,) the former case can no longer arise, and it is *only* in the latter (altogether passed by in Blackstone), that any example of *remitter* can occur.

CHAPTER III.

OF THE COURTS IN GENERAL.

[The next object of our inquiries is the redress of injuries by *suit in courts:* wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument, by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in a former chapter (*b*), the law allows an extrajudicial remedy, yet that does not exclude the ordinary courts of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or my relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by] an action of ejectment: [I may either abate a nuisance by my own authority, or call upon the law to do it for me; I may distrein for rent, or have an action for the debt, at

(*b*) Vide sup. bk. v. c. I.

[my own option: if I do not distrein my neighbour's cattle *damage feasant*, I may compel him by action of trespass to make me a fair satisfaction: if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, must indisputably suppose a previous right of obtaining redress some other way; which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be administered by action], or entry, without running into the absurdity of a man's bringing an action against, or entering upon, himself.

[In treating of the remedies by suit in courts, we shall pursue the following method: first, we shall consider the nature and several species of courts of justice; and, secondly, we shall point out what injuries are cognizable, and how redressed, in each respective species of court.

First, then, of courts of justice. And herein we will consider, first, their nature and incidents in general; and, then, the several species of them erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered (*c*). And, as by our excellent constitution the sole executive power of the laws is vested in the person of the sovereign, it will follow that all courts of justice, (which are the medium by which he administers the laws,) are derived from the power of the crown (*d*). For whether created by act of parliament, or letters-patent, or subsisting by prescription, (the only methods by which any court of judicature can exist (*e*),) the king's consent in the two former, is expressly, and in the latter, impliedly, given. In all these courts the sovereign is supposed, in contemplation of law, to be always present: but as that is

(*c*) Co. Litt. 58.

(*d*) Vide sup. vol. II. p. 515.

(*e*) Co. Litt. 260.

[in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review.

All these in their turns will be taken notice of in their respective places: but we may here mention one distinction that runs throughout them all; viz., that some of them are courts *of record*, others *not of record*. A court of record is that where the acts and judicial proceedings are enrolled in parchment, for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question (*f*). For it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*g*). And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record the court will direct him to amend it. All courts of record are the courts of the sovereign, in right of the crown and royal dignity (*h*);] and therefore every court of record has authority to fine and imprison for contempt of its authority (*i*); while on the other hand [the very erection of a

(*f*) As to records, vide Co. Litt. by Harg. 260, n. (1); sup. vol. I. p. 48.

(*g*) Co. Litt. 260; sup. vol. I. p. 482, n. (*d*).

(*h*) Finch, L. 231.

(*i*) 8 Rep. 38 b; Hawk. b. 2, c. 22, s. 1; Bac. Abr. Courts, E.; R. *v.* Clement, 4 B. & Ald. 233; R. *v.* Davison, 5 B. & Ald. 337; R. *v.* James, ibid. 894. As to attachment for contempt of court generally, see Miller *v.* Knox, 4 Bing. N. C. 574;

[new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record (*k*).] But the courts not of record, or those of them at least in which the common law is administered, are of inferior dignity, and in a less proper sense the king's courts—and these are not intrusted by the law with any power to fine or imprison the subjects of the realm, unless by the express provision of some act of parliament (*l*). In these also, [the proceedings are not enrolled or recorded; but as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*m*).

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual, in the higher courts, to have attorneys and counsel, as assistants.

An attorney at law,] (called in the courts of equity a solicitor) [answers to the *procurator*, or proctor of the civilians and canonists (*n*). And he is one who is put in the place, stead, or *turn* of another, to manage his proceedings in a cause. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, (according to the old Gothic constitution (*o*),) unless by special licence under the king's letters patent (*p*).] And an infant, a married woman, or an idiot, cannot to this day, in point

Doe *d.* Cardigan *v.* Bywater, 7 C. B. 794. For contempt in county courts, 9 & 10 Vict. c. 95, s. 113; 12 & 13 Vict. c. 101, s. 2; Levy *v.* Moylan and others, 1 Lill. & P. 307.

(*k*) Groenvelt *v.* Burwell, Salk. 200; Grenville *v.* College of Physicians, 12 Mod. 388.

(*l*) Dyson *v.* Wood, 3 Barn. & Cress. 449.

(*m*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

(*n*) Pope Boniface the eighth, in 6 Decretal. l. 3, t. 16, s. 4, speaks of "*procuratoribus, qui in aliquibus partibus* atornati *nuncupantur.*"

(*o*) Stiernh. De Jur. Goth. l. i. c. 6.

(*p*) F. N. B. 25.

of *form*, appear by attorney; but, even when an attorney is actually employed for them, should be described as appearing in person, or by guardian, according to the nature of the case (*q*). [But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed quia hoc non minimam incommoditatem habebat, cœperunt homines per procuratores litigare*" (*r*), so with us, upon the same principle of convenience, it is now permitted in general (*s*), that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts (*t*); and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there (*u*), so they are peculiarly subject to the censure and animadversion of the judges.] But as to the particular regulations applicable to attorneys and solicitors we must refer the reader to a former chapter (*x*), in which we had occasion to consider this matter more in detail.

(*q*) Bro. Abr. t. Idcot, 4; Co. Litt. 135 b; 2 Saund. 212, n. (4); Beverley's case, 4 Rep. 124 b; Oulds *v.* Sansom, 5 Taunt. 261. A lunatic, however, may appear by attorney. Beverley's case, ubi sup.; Humphreys *v.* Griffiths, 6 Mee. & W. 89.

(*r*) Inst. 4, tit. 10.

(*s*) According to Blackstone this was first permitted by stat. Westm. 2, c. 10 (see 3 Bl. Com. 26). It was provided, however, by a previous statute (statute of Merton, 20 Hen. 3, c. 10), that every freeman might make attorney in suit to the court of the county, tithing, hundred, and wapentake, or the court of his lord. And even in the time of Henry the second, a party who had appeared in person, might afterwards appoint an attorney (*responsalis*) to represent him in the cause. Glan. lib. xi. c. 1.

(*t*) So early as the statute 15 Edw. 2, regulations were made as to the admission of attorneys; and by 4 Hen. 4, c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. The regulations to which they are now subject are to be found in the statute, 6 & 7 Vict. c. 73, by which the two statutes first mentioned, (with others on the same subject,) are repealed. See as to attorneys, Reg. Gen. Hil. T. 1853, r. 2—5, 165, 167.

(*u*) Such, for example, as mentioned, post, p. 371.

(*x*) Vide sup. p. 308.

Of counsel, called, among the civilians, advocates, there are in our courts of common law and equity [two species or degrees: barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the Inns of Court (*y*); and are in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years' standing; at which time, according to Fortescue (*z*), they might be called to the state and degree of serjeants, or *servientes ad legem* (*a*). How antient and honourable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers (*b*), that it need not be here enlarged on.] It is sufficient to observe, [that serjeants at law are bound, by a solemn oath (*c*), to do their duty to their clients: and that, by custom (*d*), the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench (*e*). From both these degrees some are usually

(*y*) Vide sup. vol. I. p. 19.

(*z*) De LL. c. 50.

(*a*) A barrister, upon taking the degree of the *coif*, or becoming a serjeant, (a promotion for which no particular length of standing at the bar is now required,) retires from the inn of court by which he was called to the bar, and becomes a member of *Serjeants'* Inn. Of these, in former times, there were three: Scroop's Inn, or Serjeants' Place, opposite St. Andrew's Church, Holborn; Serjeants' Inn, Fleet Street; and Serjeants' Inn (once called Faryndon Inn), Chancery Lane; but only the last remains at the present day a law society. In the Hall of this Inn, during term, the judges and serjeants dine together; and there the judges sit as visitors of the inns of court. It is also used for holding the revenue sittings of the Court of Exchequer.

(*b*) Fortesc. c. 50; 10 Rep. pref.; Dugdal. Orig. Jurid.; Case of the Serjeants, 6 Bing. N. C. 235. To which may be added a tract by the late Serjeant Wynne, printed in 1765, entitled "Observations touching the Antiquity and Dignity of "the Degree of Serjeant at Law;" and "*Serviens ad Legem*," by Mr. Serjeant Manning. Et vide sup. vol. I. p. 17.

(*c*) 2 Inst. 214.

(*d*) Fortesc. c. 50.

(*e*) Blackstone thinks that "the "original of this was probably to "qualify the puisné barons of the "Exchequer to become justices of "assize, according to the exigence "of the statute 14 Edw. 3, c. 16."—(3 Bl. Com. 27.)

[selected to be her majesty's counsel learned in the law; the two principal of whom are called her attorney and solicitor-general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causâ*, without either patent or fee (*f*): so that the first of the modern order, (who are now the sworn servants of the crown; with a standing salary,) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the second (*g*). These queen's counsel answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown, without special licence (*h*); in which restriction they agree with the advocates of the fisc (*i*); but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the sovereign; for excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (*k*). A custom has of late years prevailed of granting letters patent of precedence, to such barristers as the crown thinks proper to honour with that mark of distinction; whereby they are entitled to such rank and pre-audience (*l*) as are

(*f*) See his Letters, 256.

(*g*) See his Life by Roger North, 37.

(*h*) Hence none of the king's counsel can publicly plead in court for a prisoner, or a defendant, in a criminal prosecution, without a licence; which is never refused; but an expense of about 9*l*. must be incurred in obtaining it. (Christian's Black. vol. iii. p. 27, n. (*n*).)

(*i*) Cod. 2, 2, 1.

(*k*) Ibid. 2, 7, 13.

(*l*) Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence at the bar. It supposes the reign of a *king*; but can be easily adapted to the case where (as at present), a *queen* holds the sceptre.

1. The king's attorney-general. By the king's mandate, 14th December, 1814, the attorney and solicitor-general are to have place and audience before the king's premier serjeant. (See 6 Taunt. 424.) In the time of Blackstone they took rank after him, and also after the king's antient serjeant.

2 The king's solicitor-general.

3. The king's premier serjeant (so constituted by special patent).

4. The king's antient serjeant, or the eldest among the king's serjeants..

[assigned in their respective patents;] which in a king's reign is [sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen consort's attorney and solicitor-general (*m*)) rank promiscuously with the king's counsel, and together with them sit *within* the bar of the respective courts,] instead of sitting *without* it, as is the case with counsel in general (*n*): [but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (*o*) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their *clients*, like the dependents upon the antient Roman orators. Those indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence; and so like-

5. The king's serjeants.
6. The king's counsel; and those who have patents of precedence; (with the queen consort's attorney and solicitor).
7. Serjeants at law.
8. The Recorder of London.
9. Advocates of the civil law.
10. Barristers.

It is to be observed that this list does not include the *king's advocate general*, whose rank seems to be not fully settled. He claims, however, to take precedence of the whole bar. See Manning's "*Serviens ad Legem*," pp. (19), (20).

(*m*) Seld. Tit. of Hon. 1, 6, 7. Vide sup. vol. II. p. 454.

(*n*) In the Court of Exchequer two barristers, called the *post*-man and the *tub*-man (from the places in which they sit), have a precedence in motions. (See R. *v.* Bishop of Exeter, 7 Mee. & W. 188.)

(*o*) Until a recent period, an exception to this had immemorially existed as regards the Court of Common Pleas, the serjeants having always had the exclusive privilege of being heard in that court, at its sittings in *banc*, and no other counsel being admitted there. And though in 1834 a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that the privilege, being founded on immemorial usage, could not be taken away by the warrant of the crown. (Case of the Serjeants, 6 Bing. N. C. 235.) By statute, however, 6 & 7 Vict. c. 18, s. 61, it was afterwards enacted, that, in the particular case of appeals to the Common Pleas from the decision of the revising barristers, on the right of voting at parliamentary elections, all barristers should be entitled to audience. And now by 9 & 10 Vict. c. 54, it is provided generally, that all barristers at law, according to their re-

[wise it is established with us (*p*) that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*q*): as is also laid down with regard to advocates in the civil law (*r*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*s*). And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless (*t*): but if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured (*u*). And counsel guilty of deceit or collusion are punishable by the statute of Westminster the first (3 Edw. I. c. 28) with imprisonment for a year and a day, and perpetual silence in the courts; a punishment] that even in modern times has been [inflicted for gross misdemeanors in practice (*x*).]

spective rank and seniority, shall have equal right and privilege of practising, pleading, and audience, in the Court of Common Pleas at Westminster, with the serjeants at law. (See 3 C. B. 537.)

(*p*) Davis, pref. 22; 1 Ch. Rep. 38.

(*q*) Davis, 23.

(*r*) Ff. 11, 6, 1.

(*s*) Tac. Ann. 1, 11, 7.

(*t*) Vide Hodgson *v.* Scarlett, 1 B. & Ald. 232. But the subsequent publication of such matter is unlawful. Flint *v.* Pike, 4 B. & C. 473. As to the power of counsel to bind their clients by arrangements entered into for them, in court, see Hoblen (in re), 8 Beav. 101; Mole *v.* Smith, 1 Jac. & Walk. 673; Swinfen *v.* Swinfen, 18 C. B. 485.

(*u*) Brook *v.* Sir H. Montague, Cro. Jac. 90.

(*x*) Ray. 376.

We shall close this chapter with a remark applicable both to attorneys and counsel, viz. that they possess the exclusive privilege of transacting business in the courts of justice in matters in which they are not personally concerned. For no man can conduct the practical proceedings in a cause to which he is himself not party, unless he be an attorney (*y*); nor is any man allowed to address the court, in such a cause, unless he be either attorney or counsel (*z*). In the superior courts, indeed, the latter province belongs to counsel alone, exclusively even of the attorneys (*a*).

(*y*) Vide 6 & 7 Vict. c. 73, s. 2. Independently of their exclusive right of conducting the practical proceedings (or business out of court), it is by the attorneys alone that the counsel are retained and instructed to address the court;—it being unusual for the counsel to communicate for these purposes with the party himself. It has been decided, however, that there is no compulsory rule on this subject, and that it is governed only by the conventional usage of the bar, founded on considerations of propriety and convenience. See the judgment of Lord Campbell, Doe *d.* Bennett *v.* Hale, 15 Q. B. 171.

(*z*) It seems that the same rule exists in the case of proceedings before the under-sheriff, vide Tribe *v.* Wingfield, 2 Mee. & W. 128. The only exception to this rule is, that by 15 & 16 Vict. c. 54, s. 10, it is provided, as to the *county courts*, that any person, though not a barrister or attorney, *may by leave of the judge* address the court instead of the party.

(*a*) Collier *v.* Hicks, 2 B. & Ad. 668. This privilege of counsel is of great antiquity. Notices of it occur in the reign of Henry the third; Plac. Ab. 137; Canc. Rot. 22, temp. 32 Hen. 3; Matt. Par. Hist. p. 1077. And it is probable that it was of much earlier date than this. As to this privilege of counsel at *quarter sessions*, see Ex parte Evans, 9 Q. B. 279. We may remark here, that by 6 Geo. 4, c. 50, s. 2, practising barristers and attorneys are exempt from serving on juries; and by 5 & 6 Vict. c. 109, s. 6, exempt from serving as parish constables; and they are also exempt from the office of overseers. (See Arch. Justice of the Peace, *Poor*, 113.) They are also privileged from arrest in civil cases, while attending the courts, *eundo, morando, et redeundo*. See Luntly *v.* Nathaniel, 2 Dowl. P. C. 51; Newton *v.* Constable, 2 Q. B. 157; Whalley *v.* Pepper, 7 Car. & P. 514; Flight *v.* Cook, 1 D. & L. 714; Phillips *v.* Pound, 7 Exch. 881.

CHAPTER IV.

OF THE COURTS OF GENERAL JURISDICTION—AND, FIRST, OF THOSE OF COMMON LAW AND EQUITY.

[WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts;—the universally established courts of common law and equity (*a*); the ecclesiastical courts; the courts military; and courts maritime (*b*). And, first, of such public courts as are courts of common law and equity.

The policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors in the kingdom; wherein injuries were redressed, in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts,

(*a*) As to the distinction between common law and equity, vide sup. vol. I. p. 81.

(*b*) The *ecclesiastical*, *military* and *maritime laws*, though founded on the imperial and canonical constitutions, are in one sense to be considered as part of the *common law* of the realm, vide sup. vol. I. pp. 61, 62. It will be observed, however, that in the distinction above laid down, they are distinguished, (as convenience usually requires,) from the *common law*.

[which were respectively constituted to correct the errors of the inferior ones, and to determine such cases as, by reason of their weight and difficulty, demanded a more solemn discussion; the course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally similar to that which prevailed in Mexico and Peru, before they were discovered by the Spaniards, and to that which was established in the Jewish republic, by Moses. In Mexico, each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of twelve judges (*c*). Peru, according to Garcilasso de Vega, (an historian descended from the antient Incas of that country,) was divided into small districts, containing ten families each, all registered and under one magistrate, who had authority to decide little differences and punish petty crimes. Five of these composed a higher class of fifty families; and two of these last composed another, called a hundred. Ten hundreds constituted the largest division, consisting of a thousand families; and each division had its separate judge or magistrate, with a proper degree of subordination (*d*). In like manner we read of Moses, that, finding the sole administration of justice too heavy for him, he "chose able "men out of all Israel, such as feared God, men of truth, "hating covetousness; and made them heads over the "people, rulers of thousands, rulers of hundreds, rulers of "fifties, and rulers of tens: and they judged the people at "all seasons; the hard causes they brought unto Moses;

(*c*) Mod. Un. Hist. xxxviii. 469. (*d*) Ibid. xxxix. 14.

["but every small matter they judged themselves" (*e*).] These inferior courts for administration of justice on the spot, at least the name and form of them, still continue in our legal constitution: but as the superior courts have in practice obtained for the most part a concurrent original jurisdiction with the inferior (*f*); and as there is besides a power of removing plaints or actions from the latter to the former: upon these accounts (among others) [it has happened that these petty tribunals have fallen into decay, and almost into oblivion;] though one of them (as we shall presently see) has recently been selected as the stock on which to found a new species of inferior court, with an enlarged jurisdiction, and of a very efficient character.

[The order we shall observe in discoursing on these several courts, constituted for the redress of *civil* injuries, (for with those of a jurisdiction merely *criminal* we are not at present concerned,) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court,) confined to narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

1. The Court-baron (*g*) is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court baron is of two natures (*h*); the one is a customary court, of which we formerly spoke (*i*), apper-

(*e*) Exod. xviii.

(*f*) It has however long been the rule, that an action in a superior court to recover a liquidated demand under 40*s*., will be stayed. (See Nurden *v*. Fairbanks, 5 Exch. 738.) And by 3 & 4 Vict. c. 24, in actions of trespass, or on the case, in which the plaintiff recovers less damages than 40*s*. he will have no costs unless the judge certifies the action to have been brought to try a right or for a wilful and malicious injury. So also, by 13 & 14 Vict. c. 61, s. 11—13, if in an action of contract, brought in the superior courts, the plaintiff recovers no more than 20*l*., or in an action of tort no more than 5*l*., he will, in general, be allowed no costs (as to this, vide post, p. 383).

(*g*) 4 Inst. 268.

(*h*) Co. Litt. 58.

(*i*) Sup. vol. I. pp. 216, 221.

[taining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak,] and of which we also took some notice in a former place (*k*), [is a court of common law,] and it is held before the freeholders who owe suit and service to the manor, [the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz. the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal tenure to assist their lord in the dispensation of domestic justice. It was antiently held every three weeks; and its most important business was to determine, by writ of right, all controversies relating to the right of lands within the manor.] But now by 3 & 4 Will. IV. c. 27, s. 36, all writs of right and other real and mixed actions (except writs of right of dower, writs of dower, *quare impedit*, and ejectment), and all plaints in the nature of such actions, (except plaints for dower or free-bench,) are abolished. The court baron of which we now speak [may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40*s*. (*l*); which is the same sum, of three marks, that bounded the jurisdiction of the antient Gothic courts in their lowest instance, or *fierding courts*, so called because four were instituted within every superior district or hundred (*m*).] But the proceedings [may be removed into the superior courts by writs of *pone*, or *accedas ad curiam*, according to the nature of the suit (*n*);] and [after judgment given, a writ also of *false judgment* (*o*) lies to the courts

(*k*) Sup. vol. I. pp. 216, 221.

(*l*) Finch, 248.

(*m*) Stiernhook, De Jure Goth, l. i. c. 2.

(*n*) F. N. B. 4, 70; Finch, L. 444, 445.

(*o*) F. N. B. 18. As to writs of false judgment, see Scott *v.* Bye, 2 Bing. 344; Walker *v.* Watson, 8 Bing. 414; Finch *v.* Brook, 1 Bing. N. C. 253; S. C. 2 Bing. N. C. 324; Overton *v.* Swettenham, 3 Bing. N. C. 786; 1 Man. & Gr. 41, n. (*a*); Crookes *v.* Longden, 5 Bing. N. C.

[at Westminster, to rehear and review the cause;] which circumstances being productive of great vexation and delay, this court has now fallen into almost entire disuse (*p*). The only other point relating to it, which seems worthy of notice in this place, is, that it does not belong to the class of courts of record.

II. [A Hundred court is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges and the steward the registrar, as in the case of a court baron (*q*). It is likewise no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction (*r*). This court is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time (*s*); but its institution was probably coeval with that of hundreds themselves, which were formerly observed (*t*) to have been derived from the polity of the antient Germans. The *centeni* were the principal inhabitants of a district composed of different villages, originally in number an *hundred*, but afterwards only called by that name (*u*): and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred courts and courts baron. "*Principes regionum, atque pa-*

410; Dempster *v.* Purnell, 1 D. P. C. (N. S.) 168; Brown *v.* Gill, 3 D. & L. 823.

(*p*) By 9 & 10 Vict. c. 95, s. 14, provision is made enabling the lord of any hundred or of any honor, manor, or liberty, having any court in right thereof, in which debts or demands may be recovered, to surrender to her Majesty the right of holding such court; after which such court shall be discontinued.

(*q*) As to the office of steward of the hundred court or court baron, vide Bradley *v.* Carr, 3 Man. & Gr. 221.

(*r*) Finch, L. 248; 4 Inst. 267.

(*s*) 2 Inst. 71.

(*t*) Vide sup. vol. I. p. 126.

(*u*) "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est.*"—Tac. De Mor. Germ. c. 6.

[*gorum*, (which we may fairly construe, the lords of hundreds and manors,) *inter suos jus dicunt, controversiasque minuunt*" (*x*). And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but of that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt*" (*y*). This hundred court was denominated *haereda* in the Gothic constitution (*z*).] We may remark with respect to it, that [causes are equally liable to removal from hence, as from the common court baron, and by the same writs, and may also be reviewed by writ of false judgment.] But in practice no resort to this court is ever made (*a*).

III. [The County courts.] And here, first, we shall speak of the county court as it exists at common law (*b*), and independently of the modern courts of the same name, to be soon mentioned. The common law county court, then, exists in every county, and is incident to the jurisdiction of the sheriff. [It is not a court of record,] but might, till the introduction of the new court just referred to, [hold pleas of debt or damages under the value of 40*s*. (*c*). It might also hold plea of many real actions,] before such actions were abolished, and might entertain [all personal actions to any amount, by virtue of a special writ called a *justicies*; a writ empowering the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (*d*).] The freeholders of the county are [the real judges in this

(*x*) De Bell. Gall. l. 6, c. 22.

(*y*) De Morib. Germ. c. 13.

(*z*) Stiernhook, l. i. c. 2.

(*a*) As to the surrender of the right of holding a hundred court for the recovery of debts or demands, vide sup. p. 376, note (*p*).

(*b*) As to this court, see 4 Inst. 266.

(*c*) Ibid. See Tinniswood *v.* Pattison, 3 C. B. 243.

(*d*) Finch, 318; F. N. B. 152; Com. Dig. (C.) 5, 7, 8. The writ of *justicies* has long fallen into disuse.

court;] the sheriff, the president only, and the officer to carry its decisions into execution. [The great conflux of freeholders, which are supposed always to attend at the county court, (which Spelman calls, "*forum plebeiæ justitiæ et theatrum comitivæ potestatis* (*e*),") is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries are there proclaimed; and why all popular elections which the freeholders are to make,—as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire,—must ever be made *in pleno comitatu*, or in full county court. By the statute 2 Edw. VI. c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the antient usage, as appears from the laws of King Edward the elder (*f*): "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito: litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes (*g*). But its dignity became much impaired, when the bishop was prohibited and the earl neglected to attend it:] and in modern times but little resort to it was had as a court for the recovery of debt or damages. And now its jurisdiction in this respect, (except perhaps in the case of a writ of *justicies*,) seems to be superseded by the new county courts to which reference has been made. We may observe, however, that while that jurisdiction existed, proceedings were removable [into the superior courts, by writ of *pone* or *recordari*, in the same manner as from hundred courts and courts baron (*h*);] and any errors therein might

(*e*) Gloss *v.* Comitatus.

(*f*) C. 11.

(*g*) Wilkins's Leg. Anglo-Sax. LL. Eadg. c. 5.

(*h*) As to the practice on removal by *pone* or *recordari*, see Robinson *v.* Mainwaring, 10 Q. B. 274.

be corrected by means of the same writ of *false judgment* (*i*).

The disuse into which the contentious jurisdiction of this court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things gave rise, long since, to the establishment, by special local acts of parliament, of courts *of requests*, (or of *conscience*,) in various parts of the kingdom, for recovery of such demands. These latter courts, however, proved in their turn inadequate to the purpose, (chiefly because confined to sums of too trivial an amount, and extending only to particular places or small districts); and the necessity being generally felt of providing throughout the whole kingdom some satisfactory and uniform plan of proceeding (*j*) for recovery of all debts and demands below the amount which could conveniently be sued for in the superior courts, it was conceived that for this purpose (*k*), new inferior courts, with improved machinery, and a more ample jurisdiction, might advantageously be erected, under the name of County Courts, which should form, as it were, a graft upon the common law court of that name (*l*).

(*i*) As to the writ of false judgment, vide sup. p. 375.

(*j*) See preamble of 9 & 10 Vict. c. 95.

(*k*) The courts of conscience or request are now by the effect of 9 & 10 Vict. c. 95, and Order in Council, 9th May, 1847, (subject only to a few exceptions,) abolished. It is also now further provided, by 15 & 16 Vict. c. 54, s. 7, that on the petition of the council of any borough, or the majority of the ratepayers of any parish, within the limits of which a court of local jurisdiction other than a county court is established, her majesty may, by order in council, exclude the jurisdiction of such local court, throughout the whole, or any part, of the district of the county court.

(*l*) Prior to this, an attempt had been made to improve the means of recovering small debts in another way, viz. by extending the jurisdiction of the courts of request and other similar courts, and reforming their practice; see 8 & 9 Vict. c. 127 (repealed so far as it affects the jurisdiction of the county courts, by 9 & 10 Vict. c. 95, s. 6).

This design was carried out by the statute 9 & 10 Vict. c. 95; a short account of the enactments of which, and of other statutes passed for its amendment or extension (*m*), shall here be given.

The Act of 9 & 10 Vict. c. 95, directed that this new plan of judicature should be established by her Majesty in council, in such counties as should be thought fit (*n*); which was accordingly done by an order in council of the 9th March, 1847; and by the same order each county was divided, as the Act also directed, into a certain number of *districts* (*o*). In each of the districts so appointed, and at such towns and places therein as the order in council also specifies, the Acts require that the county court shall be held at least once in every calendar month, or at such other interval as shall be directed by a principal secretary of state (*p*); and they constitute the county court, a court of record (*q*); and direct that for such court in each district there shall be a judge, with a registrar and other officers (*r*); and provide that a suit may be commenced in any district in which the defendant, or one of the defendants, shall dwell or carry on business at the time (*s*),—or (by leave of the court) in any district in which he

(*m*) 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 20 & 21 Vict. c. 36.

(*n*) 9 & 10 Vict. c. 95, s. 1. It is provided, however, that no county court shall be established in the city of London (sect. 1); and that the courts of the universities of Cambridge and Oxford are not to be affected by the Act (sects. 140, 141).

(*o*) 9 & 10 Vict. c. 95, s. 2. It appears by the Report of the County Court Commissioners, 31st March, 1855, that the number of districts was at that time 495. These were divided into sixty circuits; for each of which there was a different judge.

(*p*) 9 & 10 Vict. c. 95, ss. 2, 56.

(*q*) Ibid. s. 3.

(*r*) 9 & 10 Vict. c. 95, s. 3, and see sects. 9, 23, 24, 31; 19 & 20 Vict. c. 108, ss. 6—17. A deputy judge is allowed in case of the illness or unavoidable absence of the judge himself; 9 & 10 Vict. c. 95, s. 20; 19 & 20 Vict. c. 108, ss. 6—11.

(*s*) By 19 & 20 Vict. c. 108, s. 18, it is provided as to the districts of the *metropolitan* county courts there enumerated, that where the plaintiff dwells or carries on business in one of them, and the defendant in any of the others, the summons may be served in either of the two.

shall have dwelt or carried on business within six calendar months before,—or (by the like leave) in any district in which the cause of action arose, without regard to the place of residence or business (*t*).

The courts so constituted, (which we shall describe, for the future, simply as the County courts, by way of distinction from the antient or common law County court,) have jurisdiction, primarily and principally, for the recovery of small debts and demands. This includes all personal actions (*u*), where the debt, damage or demand claimed is not more than 50*l.* (*x*), whether on balance of account or otherwise (*y*);—with the exception however of the action for recovery of land, called an ejectment (*z*);—and of actions in which the title to any

(*t*) 9 & 10 Vict. c. 95, s. 60.

(*u*) 9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61, s. 1. The term "action" is adopted by the Acts, by analogy to the remedy by *action* in the superior courts of the common law; as to which, vide post, ch. VII. The jurisdiction of the county courts, however, extends to certain cases in which no action lies, (the remedy being of a different kind;) viz., to cases where the plaintiff claims not more than 50*l.*, as the unliquidated balance of a partnership account, or a legacy, or a distributive share under an intestacy, (9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61), and cases where questions arise, on estates of small amount, as to the right of proving a will, or taking out letters of administration (20 & 21 Vict. c. 77, ss. 54, 55). The term "personal action" is used by way of distinction from *real* and *mixed* actions; as to which, vide post, c. VII.

(*x*) By the 9 & 10 Vict. c. 95, the jurisdiction was limited to 20*l.*; but by 13 & 14 Vict. c. 61, was raised to 50*l.* The action of Replevin (as to which, vide post, c. XI.) is peculiarly circumstanced. It may be brought in a county court, without any limitation as to amount. See 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, s. 66.

(*y*) By 19 & 20 Vict. c. 108, s. 24, the court has jurisdiction "where "the debt or demand consists of a "balance not exceeding 50*l.*, after "an admitted set-off of any debt or "demand claimed or recoverable by "the defendant from the plaintiff." By sect. 26, if an action on contract be brought in a superior court on a claim not exceeding 50*l.*, or "re-"duced by payment into court, pay-"ment, an admitted set-off, or other-"wise," to an amount not exceeding that sum, a judge may in his discretion, on the application of either party after issue joined, order the issue to be tried in a county court.

(*z*) As to the nature of an ejectment, vide post, c. XI.

corporeal or incorporeal hereditaments (*a*), or to any toll (*b*), fair, market, or other franchise, shall be in question; or in which the validity of any devise, bequest, or limitation, under will or settlement, may be disputed;—and of actions brought for any malicious prosecution (*c*); libel; slander; seduction; or breach of promise of marriage (*d*). But *by agreement in writing of both parties*, the jurisdiction is also made capable of embracing all actions whatever which may be brought in any superior court of common law (*e*). In order moreover to promote the resort to the county courts in cases of no considerable amount, it is enacted, that if in actions on contract (*f*), (not being for breach of promise of marriage,) the plaintiff shall recover no more than 20*l*. (*g*);—or if in actions for a wrong, inde-

(*a*) See Tinniswood *v.* Pattison, 3 C. B. 243; Lloyd *v.* Jones, 6 C. B. 81; Latham *v.* Spedding, 20 L. J., Q. B. 302. The county court has jurisdiction, however, to allow a plaint and issue a warrant for giving possession to a landlord, where his tenant holds over, and the rent or value did not exceed 50*l*. per annum, and no fine or premium has been paid. (19 & 20 Vict. c. 108, s. 50.) Or where the rent or value does not exceed that amount and is in arrear for half a year, and the landlord has a right to re-enter for non-payment thereof, and no sufficient distress is to be found on the premises; but the tenant may stop the proceedings last mentioned by payment of the rent, with costs, into court. (Ibid. sect. 52.)

(*b*) As to what is a question of *title to toll*, see Hunt *v.* Great Northern Railway Company, 2 L. M. & P. 268.

(*c*) As to what cause of action is a *malicious prosecution* within the meaning of this exception, see Jones *v.* Currey, 2 L. M. & P. 474.

(*d*) Among the actions excepted, was also that for "criminal conversation." But this action is now abolished by 20 & 21 Vict. c. 85, s. 59, and a new form of proceeding substituted.

(*e*) 19 & 20 Vict. c. 108, s. 23. See also sect. 25.

(*f*) The enactment *specifies* the actions, thus—"*covenant, debt, detinue*, or *assumpsit*" (13 & 14 Vict. c. 61, s. 11). "Detinue," it may be observed, is not properly an action on contract, though it seems to be here so classed. (As to these actions, vide post, c. VII.)

(*g*) 13 & 14 Vict. c. 61, s. 11. As to what amount is recovered within the meaning of this provision, in particular cases, see the following recent cases, Tonge *v.* Chadwick, 5 Ell. & Bl. 950; Ashcroft *v.* Foulkes, 18 C. B. 261; Crosse *v.* Seaman, 11 C. B. 524; Chambers *v.* Wills, 24 L. J., Q. B. 267.

pendent of contract (*h*), commenced in any of those courts, (not being for malicious prosecution, libel, slander, or seduction,) the plaintiff shall recover no more than 5*l.*,—the plaintiff shall have judgment to recover such sum *only*, without costs, unless the court shall be of opinion that there was sufficient reason for bringing the action *there* (*i*). On this subject, however, it is material to remark that—where the plaintiff dwells more than twenty miles from the defendant (*j*); or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court, within which the defendant dwells or carries on his business at the time of the action being commenced (*k*); or (in general) where any officer of the county court is a party (*l*);—in any of these cases the superior courts have a *concurrent* jurisdiction; that is, all actions and proceedings may be brought in the superior courts, at the election of the party suing or proceeding, without any such peril as above stated with regard to costs (*m*).

The Acts also regulate the course of the proceedings,—for the particulars of which we must refer to the enactments themselves (*n*). We may, however, mention generally, that

(*h*) The enactment *specifies* the actions, thus—"*trespass, trover*, or *case*" (13 & 14 Vict. c. 61, s. 11.) As to these, vide post, c. VII.

(*i*) 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, ss. 11, 12; 15 & 16 Vict. c. 54, s. 4; 19 & 20 Vict. c. 108, s. 30. See Heard *v.* Edey, 1 H. & N. 716; Reg. Gen. E. T. 1857.

(*j*) See Lake *v.* Butler, 5 Ell. & Bl. 92.

(*k*) See Bonsey *v.* Wordsworth, 18 C. B. 325; Wood *v.* Perry, 3 Exch. 442.

(*l*) See Mann *v.* Bucherfield, 20 L. J., Q. B. 265. As to the case of an action by or against the judge or officer of a county court, see also 19 & 20 Vict. c. 108, ss. 19—21.

(*m*) 9 & 10 Vict. c. 95, s. 128; 15 & 16 Vict. c. 54, s. 4. See Richie *v.* Salamo, 8 Exch. 59. By 19 & 20 Vict. c. 108, s. 39, it is also now provided, that if, in an action on contract, the plaintiff claims more than 20*l.*, or in an action of *tort* (that is, for wrong independent of contract) more than 5*l.*, and the defendant gives notice that he objects to the action being tried in the County Court, and gives security for the amount with costs,—all proceedings in the County Court shall be stayed.

(*n*) See also Rules acd Orders, with Forms, for regulating the practice of the County Courts, made 8th

the first step in any suit in the County Court, is to enter a *plaint* in a book kept by the registrar for the purpose (*o*), which is followed by a *summons*, served by the high bailiff of the court, on the defendant (*p*); and upon the day in that behalf named in the summons the plaintiff must appear, and the defendant must also appear and answer; and upon answer being made in court, the judge proceeds in a summary way to try the cause (*q*); and, upon such evidence (taken *vivâ voce* and upon oath (*r*)) as the parties on either side shall adduce, gives judgment. And it is provided, that the judge, in all actions, shall determine all questions, as well of fact as of law, unless a jury shall be summoned (*s*). But when the amount claimed exceeds 5*l.*, a jury may be summoned at the requisition either of plaintiff or defendant; and even where it does not exceed 5*l.*, a jury may be summoned, at discretion of the judge, on application of either of the parties (*t*). This jury is to consist of five persons qualified to serve as jurors in the superior courts; and they must be unanimous in their verdict (*u*). When the judgment is for the plaintiff, and the order for payment is not complied with, execution may issue against the goods of the defendant; or, in cases of fraud or contumacy, he may be committed to prison for forty days (*x*), which imprisonment however is not to operate as an extinguishment of the cause of action. And if the amount recovered (exclusive of costs) exceeds 20*l.*, and there are

December, 1856 (in pursuance of 19 & 20 Vict. c. 108,) by five of the County Court judges.

(*o*) 9 & 10 Vict. c. 95, s. 59. See In re Zohrab *v.* Smith, 17 L. J. (Q. B.) 174.

(*p*) 9 & 10 Vict. c. 95, s. 59. By the 39th of the "Rules and Orders," the summons is to be dated of the day on which the plaint was entered, and its date is to be the *commencement of the suit.* As to a special summons requiring defendant to give notice of his intention to defend, see 19 & 20 Vict. c. 108, s. 28.

(*q*) 9 & 10 Vict. c. 95, s. 74. There are some few special matters of defence, on which, if the defendant intends to rely, he must give notice in writing of them five days before the return of the summons. Ibid. s. 76.

(*r*) Ibid. s. 86.

(*s*) Ibid. s. 69.

(*t*) Ibid. s. 70.

(*u*) Sects. 72, 73.

(*x*) 9 & 10 Vict. c. 95, ss. 94, 98, 99.

no goods, the judgment may be removed into a superior court, and there enforced by the same modes of execution as a judgment originally obtained there (*y*).

Finally, we may observe that it is competent to the judge trying the cause, to direct that there shall be a new trial if he so think fit, upon such terms as he shall think reasonable (*z*). And also, that when the debt or damage claimed is above 20*l.*, and not above 50*l.* (*a*),—an appeal lies from the decision of the county court judge, upon any matter of law, or upon the admission or rejection of any evidence, to any of the superior courts at Westminster; and that such appeal is to be heard in term time by the full court, or, out of term, by any two or more of the judges sitting as a court of appeal (*b*). But the appellant must give security for the costs of the appeal, and if he be defendant, for the amount also of the judgment; and no appeal will lie, if before the decision is pronounced both parties agree in writing that the decision of the judge shall be final (*c*).

In addition to the jurisdiction already mentioned, the judges of the county courts have a variety of others,—comprising some of an original, and others of an auxiliary kind: but as they are numerous and unconnected with the main object of these courts, viz. the recovery of small debts and demands, no specific account of them can here be attempted (*d*).

(*y*) 9 & 10 Vict. c. 95, s. 103; 12 & 13 Vict. c. 101, s. 1; 19 & 20 Vict. c. 108, s. 49. As to executions in a superior court, vide post, p. 652.

(*z*) 9 & 10 Vict. c. 95, s. 89.

(*a*) See Blowers *v.* Rackham, 20 L. J. (N. S.) Q. B. 397.

(*b*) 13 & 14 Vict. c. 61, s. 14; 15 & 16 Vict. c. 54, s. 2; 19 & 20 Vict. c. 108, s. 68. As to the appeal under these provisions, see Cannon, app., Johnson, resp., 21 L. J., Q. B. (N. S.) 164; Mayor *v.* Burgess, 24 L. J., Q. B. 67; Liedmann, app., Schultz, resp., 14 C. B. 38, 52; Foster *v.* Smith, 18 C. B. 156; Jackson *v.* Beaumont, 11 Exch. 300; Mountney *v.* Collier, 1 Ell. & Bl. 630; Tattersall *v.* Fearnley, 17 C. B. 368.

(*c*) 19 & 20 Vict. c. 108, s. 69. As to *costs* in County Courts, see 19 & 20 Vict. c. 108, ss. 33—37, with the Scale of Costs made thereunder. As to writs of *certiorari*, or *prohibition*, or *mandamus*, to those courts; ss. 38—44, 49, 67.

(*d*) The following statutes confer

These several species of courts, though confined to particular localities, have nevertheless been considered in this place under the head of courts of general jurisdiction, because dispersed generally throughout the realm; but other courts fall under the same head, which are not limited to any one lordship, hundred, county, or district,—their jurisdiction being applicable to the whole kingdom at large. Of which sort is,

IV. The Court of Exchequer,—the origin of which is as follows:—[By the antient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual causes; viz., the *wittenagemote* or general council (*e*), which assembled annually or oftener, wherever the king kept his Christmas, Easter or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel; and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as

miscellaneous jurisdiction on the judges of the County Courts, in reference to their several objects:—10 & 11 Vict. c. 102 (as to Insolvent petitions);—14 & 15 Vict. c. 52 (The Absconding Debtors Arrest Act, 1851);—15 & 16 Vict. c. 31 (The Industrial and Provident Societies Act, 1852);—16 & 17 Vict. c. 51 (The Succession Duties Act, 1853);—16 & 17 Vict. c. 107 (The Customs Act, 1853);—16 & 17 Vict. c. 137 (The Charitable Trusts Act, 1853);—17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854);—17 & 18 Vict. c. 112 (The Literary and Scientific Institutions Act, 1854);—17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854);—18 & 19 Vict. c. 32 (Stannary Courts Amendment Act);—18 & 19 Vict. c. 63 (Friendly Societies Act);—18 & 19 Vict. c. 67, sec 19 & 20 Vict. c. 108, s. 4, and Order in Council, 30th January, 1856 (Summary Procedure on bills of exchange and promissory notes); 18 & 19 Vict. c. 121 (The Nuisances Removal Act for England, 1855);—18 & 19 Vict. c. 122 (The Metropolitan Building Act, 1855);—19 & 20 Vict. c. 47 (Joint Stock Companies Act, 1856);—c. 108, s. 73, County Courts Amendment Act, (Receiving Acknowledgments of Married Women);—20 & 21 Vict. c. 77, s. 54 (Probates and Administrations).

(*e*) See an account of it, Turner, Hist. Ang. Sax. vol. iii. p. 177, 6th ed.

[counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton (*f*), and other antient authors, *aula regia* or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these, there were the lord high steward and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal and examine all such writs, grants and letters as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business, both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ;* who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (*g*).

This great universal court being bound to follow the king's household in all his progresses and expeditions, the

(*f*) Lib. 3, tr. 1, c. 7.

(*g*) Spelm. Gl. 331, 332, 333; Gilb. Hist. C. P. Introd. 17.

[trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of Magna Charta, and enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster Hall, the place where the *aula regia* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judge became so too, and a chief, with other justices, of the Common Pleas, was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it (*h*). This precedent was soon after copied by King Philip the Fair, in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognizance of the parliament and its learned judges (*i*). And thus also, in 1495, the Emperor Maximilian the first, fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire (*k*).

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief jus-

(*h*) Vide sup. vol. I. p. 16.
(*i*) Mod. Un. Hist. xxiii. 396.
(*k*) Mod. Un. Hist. xxix. 467.

[ticiar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry the third. And in farther pursuance of this example, the other several offices of the chief justiciar were, under Edward the first (who new modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the Court of Chancery issuing all original writs under the great seal to the other courts; the Exchequer managing the king's revenue; the Common Pleas being allowed to determine all causes between private subjects; and the Court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes (*l*).]

The Court of Exchequer, then, (to which our attention is at present particularly directed,) was at first [intended principally to order the revenues of the crown, and to recover the king's debts and duties (*m*);] though it has since

(*l*) The King's Bench had also assigned to it the superintendence of both the other superior courts; as, after judgment given by either of these, it was to the King's Bench that recourse was to be had to correct any *error* in law that might be found in the proceedings. And this superiority it continued to retain until a recent period; but by 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, such errors in the Common Pleas or Exchequer, as well as those in the King's Bench itself, are now to be redressed exclusively in a court of separate jurisdiction, viz., the Court of Exchequer Chamber.

(*m*) 4 Inst. 103—116; vide Gilbert's Exch.; Attorney-General v. Sewell, 4 Mee. & W. 77.

acquired, and originally by usurpation (*n*), the additional character of an ordinary court of justice between subject and subject. [It is called the Exchequer (*Scaccarium*), from the chequed cloth, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. It consists of two divisions, the *Receipt* of the Exchequer (*o*), which manages the royal revenue,] and which is not material to our present purpose: [and the *Court*, or *judicial* part of it.]

This court was, from the time of the separation of the Exchequer from the *aula regia* down to a very recent period, [subdivided into a court of equity (*p*) and a court of common law.] But by statute 5 Vict. c. 5,—reciting that the business of the latter branch, or *plea side*, of the court had greatly increased, and that the judges thereof might advantageously be relieved from the equity business,—all the power and jurisdiction of the Exchequer, as a court of equity, or otherwise than as a court of law or court of

(*n*) The nature of this usurpation was as follows:—By the original constitution of this court, to which it was incident, (as stated in the text,) to call the king's farmers and debtors to account, such parties as these were privileged in their turn to sue and implead all manner of persons in the same court that they were themselves thus called into. For this purpose they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. Afterwards, and by gradual connivance, this surmise of being debtor to the king, was allowed to be inserted by persons who did not really stand in that capacity; and came to be considered as mere words of course, so as to open the court to all the nation equally. The same fiction was permitted on the equity side of the court, where any person might file a bill against another upon a bare suggestion that he was the king's accountant,—a suggestion which was never controverted. This usurpation, as well as the analogous one in the Queen's Bench, (to be hereafter noticed,) long since ripened into an indefeasible and unquestionable title. And at length, by 2 Will. 4, c. 39, the writ of *quo minus* was abolished; and a new method substituted, giving a direct and proper jurisdiction to this court.

(*o*) Vide sup. vol. II. p. 536.

(*p*) Vide 3 Bl. Com. 45.

revenue unconnected with equity, was transferred to the Court of Chancery (*q*). The Court of Exchequer is now therefore a court of revenue and a court of common law only (*r*). In the former capacity it ascertains and enforces, by proceedings appropriate to the case, the proprietary rights of the Crown against the subjects of the realm (*s*); in the latter, it administers redress between subject and subject, in all actions whatever; except in the few species of real actions, which still survive the general demolition of that class. It is a court of record; and its judges are at present five in number, consisting of one chief *baron* and four puisne *barons*, as in this court the judges are termed (*t*). Proceedings in error, from this court, (that is, proceedings

(*q*) As to the equitable jurisdiction of the Exchequer as a court of *revenue* since this statute, see Attorney-General *v.* Hallett, 15 Mee. & W. 687; Attorney-General *v.* The Corporation of London, 14 L. J. (Ch.) 305. By 5 & 6 Vict. c. 86, certain offices on the revenue side are abolished; and the business theretofore transacted therein is transferred to *her majesty's remembrancer in the Exchequer*; whose office the lords commissioners of the Treasury are empowered to regulate. The attornies of the Queen's Bench, Common Pleas, and Exchequer of Pleas, are also, by the same statute, admissible to practise in the Exchequer on the revenue side; and all process from the revenue side may be tested and made returnable either in term or vacation.

(*r*) For regulations of the officers of this court on the plea side, see 2 & 3 Will. 4, c. 110.

(*s*) See 18 & 19 Vict. c. 90, assimilating the practice as to giving and receiving costs in proceedings instituted on behalf of the Crown, in matters relating to the public revenue, to that which obtains in suits between subject and subject; and for amending the procedure and practice on Crown suits in the Court of Exchequer. It may be remarked, that, in any case in which the profit of the Crown comes in question, a cause commenced in another court may, on the application of the attorney-general, be removed into the Exchequer. (Attorney-General *v.* Hallett, 15 Mee. & W. 97; Adams *v.* Freemantle, 2 Exch. 453.

(*t*) "These," says Blackstone, "Mr. Selden conjectures (Tit. of "Hon. 2, 5, 16,) to have been anciently made out of such as were "barons of the kingdom or parliamentary barons, and thence to "have derived their name; which "conjecture receives great strength "from Bracton's explanation of "Magna Charta, c. 14, which directs that the earls and barons be "amerced by their peers, that is, "says he, by the barons of the Ex"chequer. Bract. l. 3, tr. 2, c. 1, "s. 3."—3 Bl. Com. 45.

to correct any error that may be found in the judgment of this court,) may be taken into the Court of Exchequer Chamber; to which we shall have occasion more particularly to advert in the course of the present chapter.

V. The Court of Common Pleas (u), (or, as it is sometimes technically called, the Court of Common Bench,) whose origin has been already explained (v), is also a court of record; and in that capacity takes cognizance of all actions between subject and subject, without exception; including formerly the extensive class of real actions, of which it still retains the few surviving species. And over remedies of this kind, (which formerly excelled all others in importance,) it has always exercised an *exclusive* jurisdiction, as it did also over fines and recoveries, while these modes of assurance existed, and still does, over the forms of conveyance now substituted for them (w). For these reasons, and also because its authority in these matters was original and not usurped, (as in the case of the Exchequer and Queen's Bench,) it has always been considered as the principal seat of learning relative to ordinary actions between man and man, and is styled by Lord Coke, the lock and key of the common law (x). It has no authority, however, like the Exchequer, in matters relating to the revenue. The judges are at present five in number,—one chief and four puisné justices; and from their decision proceedings in error may be taken into the Exchequer Chamber.

VI. [The Court of Queen's Bench (y) (so called because

(u) See 8 & 9 Vict. c. 34, abolishing the separate seal office of the Courts of Queen's Bench and Common Pleas; and 13 & 14 Vict. c. 75, as to the fees to be received by certain officers of the Common Pleas.

(v) Vide sup. p. 388.

(w) This court has now also an exclusive jurisdiction in cases of appeal from the barristers appointed to revise the lists of parliamentary voters (see 6 & 7 Vict. c. 18); and in cases arising under the Railway and Canal Traffic Act, 1853 (17 & 18 Vict. c. 31).

(x) 4 Inst. 99.

(y) This court is called the King's Bench in the reign of a king; and

[the sovereign used formerly to sit there in person (z), the style of the court still being *coram ipso rege*)], or *coram ipsâ reginâ*, is also a court of record, and the [supreme court of common law in the kingdom: consisting of a chief justice and four *puisné* justices, who are, by their office, the sovereign conservators of the peace, and supreme coroners of the land. Yet, though the sovereign himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered (*a*) to, determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority (*b*).

This court, which (as we have seen) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the sovereign's person wherever he goes; for which reason all process issuing out of this court in the sovereign's name is returnable "*ubicunque fuerimus in Angliâ.*" It hath indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but might remove with the sovereign to York or Exeter, if she thought

during the protectorate of Cromwell it was styled the Upper Bench.

The *Bail Court* is a branch of this court, constituted under 11 Geo. 4 & 1 Will. 4, c. 70, s. 1.

(*z*) 4 Inst. 73.

(*a*) Vide sup. vol. II. p. 516. The king used to decide causes in person, in the *Aula Regia*. "*In curia domini regis ipse in propria persona jura decernit.*"—(Dial. de Scacch. l. i. s. 4.) After its dissolution, Edward the fourth, in the second year of his reign, sat in the Court of King's Bench three days together, but probably not for the purpose of acting as a judge. (See Christian's Black. vol. III. p. 41, (n.), and Henry's Hist. of Great Britain, vol. V. p. 382.) And, in later times, James the first is said to have sat there in person, but was informed by his judges that he could not deliver an opinion.

(*b*) 4 Inst. 71. Lord Coke says, that the words in *Magna Charta*, c. 29, "*nec super eum ibimus, nec super eum mittemus nisi, &c.*," signify that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. (2 Inst. 46.) But that this is an erroneous construction of these words, appears from the *Magna Charta* granted by King John in the sixteenth year of his reign, which is thus expressed: "*Nec super eos per vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum.*" (See Introd. to Blackstone's Mag. Ch. p. xiii.—Christian's Bl. vol. iii. p. 41, (n.))

[proper to command it. And we find that, after Edward the first had conquered Scotland, it actually sat at Roxburgh (c). And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes; qui omnium aliorum corrigere tenentur injurias et errores*" (d). And it is, moreover, especially provided in the *Articuli super Chartas* (e), that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The jurisdiction of this court is very high and transcendant. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side or crown office (*f*); the latter in the plea side of the court (*g*). The jurisdiction of the crown side it is not our present business to consider;—that will be more properly discussed in the ensuing volume. But on the plea side, or civil branch,] it enjoys, (though originally by usurpation, as in the case of the Exchequer,) a general jurisdiction and cognizance over all actions between subject and subject, those of the real class only excepted (*h*). It

(*c*) M. 20, 21 Edw. 1; Hale, Hist. C. L. 200.

(*d*) L. 3, c. 10.

(*e*) 28 Edw. 1, c. 5.

(*f*) Vide 6 & 7 Vict. c. 20, for abolishing certain offices on the crown side of the Queen's Bench, and regulating the crown office.

(*g*) Vide 6 Geo. 4, c. 82, to abolish the sale of offices in the Court of King's Bench, &c.

(*h*) The usurpation of the Queen's Bench originated as follows:—The jurisdiction of this court in civil actions was formerly confined to actions of trespass, or other injury alleged to be committed *vi et armis*. But this court might always have held plea of

does not meddle however with matters of revenue. Proceedings in error may be taken from this court, into the Exchequer Chamber (i).

The three courts last enumerated, when mentioned collectively, are usually described as the Superior courts of the common law (j): or when taken in connection with the Court of Chancery, to be presently mentioned, as the Superior courts generally, or the Courts at Westminster: where they are all in fact holden. And by these appellations they are usually distinguished from the courts of special jurisdiction, of which we are to speak hereafter; and

any civil action (other than actions real),—provided the defendant was an officer of the court, or in the custody of the marshal, that is, of the prison keeper of the court. To make this privilege available against *any* defendant, the fiction was invented of surmising, that the defendant had committed a breach of the peace in Middlesex or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middlesex (as the case might be), was issued against him; by virtue of which he was supposed to be committed to the custody of the marshal, so as to bring him within the jurisdiction of the court as to any personal action. Where the proceeding was against a prisoner (whether by aid of these fictions or otherwise), or against an officer of the court, the action was said to be commenced *by bill*. But in other cases the commencment was by an *original writ;* that is, a writ out of the Court of Chancery, under the great seal. Both of these modes of proceeding were abolished by the effect of 2 Will. 4, c. 39, and a new method substituted, giving to this court as well as to the Court of Exchequer (vide sup. p. 390, n. (n)), a direct and proper jurisdiction in ordinary suits, instead of that usurped (though well established) one which they had previously exercised.

(i) This is the case not only in actions first commenced in the Queen's Bench, but also upon judgments in the Queen's Bench upon error from a county palatine. (Nesbit *v.* Rishton, 9 A. & E. 426.) It is the case, also, where error is brought upon an indictment. (R. *v.* Wright, 1 A. & E. 434.)

(j) The legislature has latterly adopted this appellation. See 11 Geo. 4 & 1 Will. 4, c. 58; 3 & 4 Will. 4, c. 42; 1 & 2 Vict. c. 100; 9 & 10 Vict. c. 95, s. 78, &c. The term of a *superior court*, however, in its more antient, strict and technical application, has a wider meaning, and embraces the courts of the counties palatine. (Peacock *v.* Bell, 1 Saund. 73.) That the County courts established under 9 & 10 Vict. c. 95, are not Superior courts, though made courts of record, see Levy *v.* Moylan, 10 C. B. 210.

also from the court baron, hundred court, and county court, of which we spoke at the beginning of this chapter; all of which are described as Inferior courts, though discriminated from each other, as being either of record, or not of record (*k*). The judges of these superior courts of the common law are also often popularly called, by way of pre-eminence, the *Judges of the Land*, or simply the *Judges* (*l*); and though inferior in rank to the chief judge of the Court of Chancery, (or lord chancellor,) they are of high dignity and precedence,—taking rank before baronets (*m*), and being the constitutional advisers of the House of Lords, on matters of law (*n*). They are at present, as we have seen, fifteen in number, that is, five for each court; but the number has varied considerably at different periods of our legal history (*o*). In modern times, indeed, it remained fixed for a long period, at twelve; but in consequence of the increase of business, an additional judge was appointed, about the beginning of the reign of Will. IV. (*p*), to each of the three courts. The salary of the chief justice of the Queen's Bench is fixed at 8,000*l*., and that of the other chief justices at 7,000*l*.; of the puisne judges at 5,000*l*. per annum (*q*). They are all created by the queen's letters patent: and by 12 & 13 Will. III. c. 2, and 1 Geo. 3, c. 23, they are not liable to removal, except upon address of both houses of parliament (*r*).

(*k*) From the inferior courts of record, and from the common law courts of the counties palatine, error lies in general into the Queen's Bench. (3 Bl. Com. 411; 1 Roll. Ab. 746; Carter, 222.) An appeal also lies from the county courts into any of the superior courts; vide sup. p. 385. As to the removal into the superior courts of the judgments of inferior courts of record, in order to obtain more effectual execution, see 19 Geo. 3, c. 70, s. 4; 1 & 2 Vict. c. 110, s. 22. As to bailiffs of inferior courts generally, and execution under process thereof, 7 Vict. c. 19; 7 & 8 Vict. c. 96, s. 60, &c.; 8 & 9 Vict. c. 127. As to appointing *assessors* for the same, see 7 & 8 Vict. c. 96, s. 72.

(*l*) As to the *Judges*, see also vol. II. p. 482.

(*m*) Vide sup. vol. II. p. 621.

(*n*) Vide sup. vol. II. p. 352.

(*o*) Dugd. Orig. Jurid. c 18.

(*p*) See stat. 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2.

(*q*) 2 & 3 Will. 4, c. 1—16; and 14 & 15 Vict. c. 41.

(*r*) As to the judges and officers

VII. [The High Court of Chancery is the only remaining, and in matters of civil property by much the most important, of any of the superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the Lord Chancellor, or *cancellarius*; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters-patent when granted contrary to law, which is the highest point of his jurisdiction (*s*). But the office and name of chancellor (however derived), was certainly known to the courts of

of the superior courts of common law collectively, the following statutes may also be noticed:

3 Geo. 4, c. 69, to enable the judges of the several courts of record at Westminster to make regulations respecting the fees of the officers, clerks, and ministers of the said courts. (And see 7 Will. 4 & 1 Vict. c. 30, s. 6.)

11 Geo. 4 & 1 Will. 4, c. 58, for regulating the receipt and future appropriation of fees and emoluments receivable by officers of the superior courts of common law. (And see 13 & 14 Vict. c. 75.)

11 Geo. 4 & 1 Will. 4, c. 70, s. 1, enabling one judge to sit apart from the rest.

3 & 4 Will. 4, c. 42, s. 1, giving power to the judges of the superior courts of common law at Westminster to alter the mode of pleading, &c. (And see 1 & 2 Vict. c. 100; 13 & 14 Vict. c. 16; 15 & 16 Vict. c. 76, s. 223; 18 & 19 Vict. c. 26.)

7 Will. 4 & 1 Vict. c. 30, to abolish certain offices in the superior courts of common law; and to make provision for a more effective and uniform establishment of officers in those courts.

1 & 2 Vict. c. 32, to enable her majesty's courts at Westminster to hold sittings in banc in time of vacation.

1 & 2 Vict. c. 45, (extending 11 Geo. 4 & 1 Will. 4, c. 70, s. 4,) empowering every judge of the superior courts of common law to transact out of court such business relating to the proceedings in any of these courts, as may by the practice be transacted by a single judge.

15 & 16 Vict. c. 73, making provision for a permanent establishment of officers at *Nisi Prius*; and for payment of such officers, and of judges' clerks, by salaries.

15 & 16 Vict. c. 76, s. 225, enabling the judges of each of the courts to make rules and orders for the government and conduct of the ministers of their respective courts, in and relating to the distribution and performance of the duties, &c., to be done in the execution of that Act.

17 & 18 Vict. c. 125, s. 97, making it lawful for any eight of the judges, (the chiefs of each court being three,) to make general rules and orders for the effectual execution of that Act.

(*s*) 4 Inst. 88.

[the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendence over the rest of the officers of the prince. From the Roman empire, it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor; with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner: and therefore, when seals came in use, he had always the custody of the sovereign's great seal. So that the office of chancellor, or lord keeper, (whose authority, by statute 5 Eliz. c. 18, is declared to be exactly the same,) is with us at this day created by the mere delivery of the Great Seal into his custody (*t*); whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom;] and superior, in point of precedency, (if a baron,) to every temporal lord (*u*). His salary is 10,000*l*. per annum (*v*). He is a privy councillor by his office (*w*); and according to Lord Chancellor Ellesmere, prolocutor of the House of Lords by prescription (*x*). To him, (under the crown,) belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings,) and presiding over the royal

(*t*) Lamb. Archeion, 65; 1 Roll. Abr. 385.

(*u*) Stat. 31 Hen. 8, c. 10, ss. 4, 8; see the Table of Precedence, sup. vol. II. p. 621, *in notis*.

(*v*) 14 & 15 Vict. c. 82, s. 17; 15 & 16 Vict. c. 87, s. 16. The sum, however, which is payable to him as speaker of the House of Lords, is to be deducted from this.

(*w*) Selden, Office of Lord Chancellor, sect. 8.

(*x*) Of the Office of Lord Chancellor, edit. 1651.

[chapel (*y*), he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings] of the value of 20*l.* per annum or under (*z*), in the king's books. [He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity, in the Court of Chancery; wherein, as] formerly [in the Exchequer, there are two distinct tribunals; the one ordinary, being a court of common law] and of record; the other extraordinary, being a court of equity, and not of record (*a*).

[The ordinary legal court is much more antient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters-patent, when made against law, or upon untrue suggestions (*b*); and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like; when the king had been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right (*c*). On proof of which, as the sovereign can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the

(*y*) Madox, Hist. of Exchequer, 42.

(*z*) This limit is stated by Blackstone as "under the value of twenty marks;" and he cites 38 Edw. 3; 3 F. N. B. 35. But, according to Mr. Christian, since the new valuation of benefices in the time of Henry the eighth, it has been considered as 20*l.* per annum or under, probably on the ground that the twenty marks temp. Edward the third were equivalent to 20*l.* temp. Henry the eighth. Christian's Black. vol. iii. p. 476, n., cites Gibs. 764; 1 Burn's Ecc. Law, 129. And see Lord Chancellor's case, Hobart, 214.

(*a*) No court can be a court of record, in the proper and technical sense, unless it has been ranked as such from time immemorial; or has been made such by the express provision of some act of parliament. The Court of Chancery, on the equity side, is in such a predicament, and therefore, notwithstanding its high dignity, is no court of record. (4 Inst. p. 84.)

(*b*) Vide 12 & 13 Vict. c. 109; 15 & 16 Vict. c. 83.

(*c*) 4 Rep. 54. As to suits proceeding from or affecting the crown, vide post, bk. v. c. xv.

[chancellor, the keeper of his conscience.] This court [might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary (*d*): and of dower (*e*), where any ward of the crown was concerned in interest, so long as the military tenures subsisted; as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown (*f*): and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. VIII. c. 6 (*g*).] Suits or proceedings, however, on the common law side of the Court of Chancery are somewhat rare; and even where they occur, they are not wholly carried on there: it being provided by 12 & 13 Vict. c. 109, that where any issue (or question, either of fact or law, arises in such action, a transcript of the record in Chancery in which such issue is contained, is to be sent into one of the superior courts of the common law, to be there determined; that is, if it be an issue in fact, to be tried by a jury; and if an issue in law, to be determined by the court itself, according to the ordinary course of proceeding before those jurisdictions (*h*).

(*d*) Co. Litt. 171; F. N. B. 62.

(*e*) Bro. Abr. tit. Dower, 66; Moor, 565.

(*f*) Bro. Abr. tit. Dismes, 10.

(*g*) 2 Roll. Abr. 469. It also formerly belonged to this court to hold plea of all personal actions, where any of its officers was a party (3 Bl. Com. p. 40, cites 4 Inst. 80). But now by 12 & 13 Vict. c. 109, s. 42, this privilege of the officers is abolished.

(*h*) 12 & 13 Vict. c. 109, s. 32, (repealing 11 & 12 Vict. c. 94, so far as it relates to this subject). As to the effect of these provisions, see Garrard, *dem.*, Tuck, *ten.*, 8 C. B. 258. Even before they were made, if any cause came to an issue in fact in the Court of Chancery, that court could not try it, (having no power to summon a jury,) but was to deliver the record *propriâ manu* into the Court of Queen's Bench. And when an issue in law arose, and was there decided, a writ of error, in the nature of an appeal, lay into the Court of Queen's Bench (see 3 Bl. Com., citing Year Book, 18 Edw. 3, 25; 17 Ass. 24; 29 Ass. 47; Dyer, 315; 1 Roll. Rep. 287; 4 Inst. 80.) So little, however, had usually been done on the common law side of the court, that Blackstone says he had met with no traces of any writ of error being actually brought, since the 14 Eliz. A.D. 1572 (see 3 Bl. Com. p. 49.) But the opinion of Lord Keeper North, in 1682 (1 Vern. 131; 1 Eq. Ca. Ab 129), that no such writ of error lay, seems not to have been well considered.

[In this ordinary, or legal, court is also kept the *officina justitiæ;* out of which all original writs that pass under the Great Seal (*i*),—all commissions of charitable uses, sewers, idiotcy, lunacy, and the like,—do issue; and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiæ,* any writ that his occasions may call for. These writs (relating to the business of the subject), and the returns to them, were, according to the simplicity of antient times, originally kept in a hamper, *in hanaperio;* and the others, (relating to such matters wherein the crown is immediately or mediately concerned,) were preserved in a little sack or bag, *in parva baga;* and thence hath arisen the distinction of the *hanaper* office (*k*), and *petty bag* office (*l*), which both belong to the common law court in Chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. Its province (as may be inferred from its appellation), is to administer that large portion of our law which, as we have elsewhere explained, is distinguished from the common law, by the term *equity* (*m*). [This distinction between law and equity, as administered in different courts (*n*), is not at present known, nor seems to have ever been known, in any other country, at any time (*o*): and yet the difference of one from the other, when administered by the same tri-

(*i*) By 12 & 13 Vict. c. 109, s. 11, a seal is to be provided, to be called "*The Chancery Common Law Seal,*" and by sect. 14, all such writs, &c. as have been usually issued out of the petty bag office under the *Great Seal* (except certain writs and instruments particularly specified), shall in future be under "*The Chancery Common Law Seal.*"

(*k*) As to the *comptrollers of the hanaper*, see 5 & 6 Vict. c. 103, transferring their duties to other officers.

(*l*) As to this office, see Baddeley *v.* Denton, 1 L. M. & P. 172; Still *v.* Booth, ibid. 440; Garrard, *dem.*, Tuck, *ten.*, 8 C. B. 258.

(*m*) As to equity, vide sup. vol. I. p. 81.

(*n*) This anomaly of administering equity and law in distinct courts, is approved by Lord Bacon. (See De Aug. Scient. lib. viii. ch. 3, app. 45.)

(*o*) The *council of conscience*, instituted by John the third, King of Portugal, to review the sentences of all inferior courts, and moderate

[bunal, was perfectly familiar to the Romans (*p*); the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws (*q*); but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton (*r*), as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward the first, and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the court of Chancery.] Nor is it very clear in what manner or under what circumstances that anomaly was first established in this country (*s*). But it was probably the result of the rude and imperfect constitution of our courts of the common law, which derived their authority in each case from the king's *original writ*, issued at the commencement of the suit, in some fixed and antient form,—so that they found, or

them by equity, (Mod. Un. Hist. xxii. 237,) seems rather to have been a court of appeal.

(*p*) Thus too the court of session in Scotland, and every jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law, (Lord Kaims, Hist. Law Tracts, i. 325, 330; Princ. of Equit. 44.)

(*q*) Thus Cicero: "*jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem pleraque jure prætorio liberantur, nonnulla legibus.*"—Offic. l. i. x.

(*r*) L. ii. c. 7, fol. 23; also f. 3 a, s. 5; see Plowd. 467.

(*s*) Some interesting information as to the early history of the Court of Chancery and the growth of its jurisdiction, will be found in the Introduction to Lord Campbell's Lives of the Chancellors; and in Spence on the Equitable Jurisdiction of the Court.

supposed, themselves unable to afford any remedy beyond what the writ so issued specifically required or authorized. For it seems that, owing to this cause, there was a frequent failure of justice in the common law courts: and that under such circumstances, [the application for redress used to be to the king in person, assisted by his privy council, (from whence also arose the jurisdiction of the Court of Requests (t), which was virtually abolished by the statute 16 Car. I. c. 10); and they were wont to refer the matter either to the chancellor and a select committee, or, by degrees, to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia* (u), but also after its dissolution, in the reign of King Edward the first (x); and perhaps during its continuance, in that of Henry the second (y).

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to antient precedents, it was provided by statute Westminster the second, (13 Edward I. c. 24), that "when-

(t) The matters cognizable in this court, immediately before its dissolution, were "almost all suits, "that by colour of equity, or sup-"plication made to the prince, "might be brought before him: but "originally and properly all poor "men's suits, which were made to "his majesty by supplication; and "upon which they were entitled to "have right without payment of any "money for the same."—(Smith's Commonwealth, b. 3, c. 7.) See also Camden on the Law Courts.

(u) "*Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quæratur apud regem.*"—LL. Edg. c. 2.

(x) Lambard. Archeion, 71.

(y) Johannes Sarisburiensis, (who died A.D. 1182, in the twenty-sixth year of Henry the second,) speaking of the chancellor's office in the verses prefixed to his Polycraticon, has these lines:

"*Hic est, qui leges regni cancellat iniquas,*
Et mandata pii principis æqua facit."

[" soever from thenceforth in one case a writ shall be found " in the Chancery, and in a like case, falling under the same " right and requiring the like remedy, no precedent of a " writ can be produced, the clerks in Chancery shall agree " in forming a new one: and if they cannot agree, it shall " be adjourned to the next parliament, where a writ shall " be framed by consent of the learned in the law (z), lest it " happen for the future, that the court of our lord the king " be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case,] as they were called, [to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case (a). Which provision (with a little accuracy in the clerks of the Chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ), might have effectually answered all the purposes of a court of equity (b); except that of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of King Edward the third, uses of land were introduced (c), and, (though totally discountenanced by the courts of common law,) were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the chancery, as a court of equity, began to be established (d); and John Waltham, who was bishop of Salisbury and chancellor to King Richard the second, (by a strained interpretation of the above-mentioned statute of West-

(z) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westminster the second.

(a) Lamb. Archeion, 61.

(b) This was the opinion of Fairfax, a very learned judge in the time of Edward the fourth. "*Le subpœna*" (says he) "*ne serroit my cy soventement use come il est ore, si nous attendomus tiels actions sur les cases, et mainteinomus le jurisdiction de ceo court, et d'auter courts.*"—(Year B. 21 Edw. 4, 23.)

(c) Vide sup. vol. I. p. 356.

(d) Spelm. Gloss. 106; R. v. Standish, 1 Lev. 242.

[minster the second,) devised a writ of *subpœna*, returnable to the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use;* which process was afterwards extended to other matters wholly determinable at the common law; upon false and fictitious suggestions; for which, therefore, the chancellor himself is, by statute 17 Rich. II. c. 6, directed to give damages to the party unjustly aggrieved. But as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts (*e*), till checked by the Constitutions of Clarendon (*f*); which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitiâ regis:*"—therefore probably the ecclesiastical chancellors, who then held the seals, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued (*g*) to grasp at the same authority as before, in suits *pro læsione fidei*, so late as the fifteenth century (*h*), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls (*i*), that in the reigns of Henry the fourth and fifth, the commons were repeatedly urgent to have the

(*e*) Lord Lyttelt. Hen. 2, Book 3, p. 361, note.

(*f*) 10 Hen. 2, c. 15; Speed. 468.

(*g*) In the fourth year of Henry the third, suits in courts christian *pro læsione fidei*, upon temporal contracts, were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspectè agatis*, supposed by some to have issued in the thirteenth year of Edward the first, but more probably (3 Pryn. Rec. 336) in the ninth year of Edward the second, suits *pro læsione fidei* were allowed to the ecclesiastical courts; according to some antient copies, (Berthelet, Stat. Antiq. Lond. 1531, 90 *b*; 3 Pryn. Rec. 336,) and the common English translation of that statute; though in Lyndewood's copy, (Prov. l. 2, t. 2,) and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(*h*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

(*i*) Rot. Par. 4 Hen. 4, Nos. 78 and 110; 3 Hen. 5, No. 46, cited in Prynne's Abr. of Cotton's Records, 410, 422, 424, 548; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

[writ of *subpœna* entirely suppressed, as being a novelty devised by the subtlety of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry the fourth, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute, 4 Henry IV. c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once, upon their whole application: and in Edward the sixth's time, the process by bill and *subpœna* was become the daily practice of the court (*k*).

But this did not extend very far: for in the antient treatise, entitled *Diversité des Courtes* (*l*), supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman; no lawyer having sat in the Court of Chancery from the times of the Chief Justices Thorpe and Knyvet, successively chancellor to King Edward the third in 1372 and 1373 (*m*), to the promotion of Sir Thomas More by King Henry the eighth, in 1530. After which the Great Seal was indiscriminately committed to the custody of lawyers, or courtiers (*n*), or churchmen (*o*), according as the convenience of the times and the disposition of

(*k*) Rot. Parl. 14 Edw. 4, No. 33 (not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.)

(*l*) Tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

(*m*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50.

(*n*) Wriothesley, St. John and Hatton.

(*o*) Goodrick, Gardner, and Heath.

[the prince required, till Serjeant Puckering was made lord keeper in 1592: from which time to the present, the Court of Chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor (*p*).

In the time of Lord Ellesmere (A.D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity, a judgment in the Court of King's Bench obtained by gross fraud and imposition (*q*). This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity (*r*), that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to the plenitude of his royal prerogative (*s*). Sir Edward Coke submitted to the decision (*t*), and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in

(*p*) Biog. Brit. 4278.

(*q*) Bacon's Works, iv. 611, 612, 632.

(*r*) Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

(*s*) "For that it appertaineth to "our princely office only, to judge "over all judges, and to discern "and determine such differences as "at any time may and shall arise "between our several courts touch- "ing their jurisdictions, and the "same to settle and determine, as "we in our princely wisdom shall "find to stand most with our honour, "&c."—(1 Chan. Rep. App. 26.)

(*t*) See the entry in the Council Book, 26th July, 1616 (Biogr. Brit. 1390).

[which he acted a very noble part (*u*)), and his controlling the commissioners of sewers (*x*), were the open and avowed causes (*y*), first of his suspension, and soon after of his removal, from his office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles the first, did little to improve upon his plan: and even after the Restoration, the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. Sir Heneage Finch, who succeeded, in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of

(*u*) In a cause of the Bishop of Winchester, touching a *commendam*, King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but upon being brought before the king and council, they all retracted and promised obedience in every such case for the future; except Sir Edward Coke, who said, "that when "the case happened, he would do "his duty."—(Biogr. Brit. 1388.)

(*x*) As to these commissioners, vide post, chap. VI.

(*y*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15th November, 1616, (Moor's Reports, 828.) Though Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers, (the new favourite,) with the disposal of the most lucrative office in his court. (Biogr. Brit. 1391.)

[redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree (z).]

The judicial duties of this court of equity have been long shared in some measure by an officer of high rank, called the Master of the Rolls, originally appointed only for the superintendence of the writs and records appertaining to its common law department (a), but accustomed also to sit on the equity side as a separate, though subordinate judge (b).

(z) In recent times, a great variety of Acts have been passed for the improvement of this court. See 2 Will. 4, c. 33, to effectuate the service of process from the Court of Chancery; 2 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103, for abolition of certain offices in Chancery; 3 & 4 Vict. c. 94, (amended by 4 & 5 Vict. c. 52; 5 Vict. c. 5, and 8 & 9 Vict. c 105,) enabling the Lord Chancellor, with advice and consent of the Master of the Rolls and Vice-Chancellor, or one of them, to alter the pleading and practice; 11 & 12 Vict. c. 10, empowering certain officers of the court to administer oaths; 12 & 13 Vict. c. 109, regulating the petty bag and enrolment office and practice on the common law side; 13 & 14 Vict. c. 35, to diminish the delay and expense of proceedings in Chancery; 14 & 15 Vict. c. 4, for continuing the third Vice-Chancellor; 14 & 15 Vict. c. 83, for appointing judges of appeal in Chancery; 15 & 16 Vict. c. 80, abolishing the Masters in Chancery, &c.; 15 & 16 Vict. c. 86, (amended by 17 & 18 Vict. c. 100, and 18 & 19 Vict. c. 134,) for amending the practice and facilitating the despatch of business in the Court of Chancery; 15 & 16 Vict. c. 87, (amended by 16 & 17 Vict. c. 98,) for relief of the suitors in Chancery; 16 & 17 Vict. cc. 22, 78.

(a) 4 Inst. 82.

(b) The Master of the Rolls was properly the chief of a body of officers called the *Masters in Chancery*, of whom there have been, until recently, ten others, including the accountant-general. (See as to these officers, 4 Inst. 82; and Smith's Commonw. bk. ii. c. 12, where it is said that so late as the reign of Elizabeth they were commonly doctors of the civil law.) The offices of the

[Concerning his authority to hear and determine causes, and his general power in the Court of Chancery, there were formerly divers questions and disputes very warmly agitated; to quiet which, it was declared by 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, shall be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor, and so as they shall not be enrolled till the same are signed by his lordship (*c*).] And by a late statute, 3 & 4 Will. IV. c. 94 (*d*), the Master of the Rolls is specially directed to hear motions, pleas and demurrers, as well as causes generally. The vast increase of business, however, to which reference has been already made, and the progress of which has been particularly marked during the last half century, having at length become such as to render the antient force of the Court of Chancery wholly inadequate to the labours it had to perform, it was found necessary, in the year 1813 (*e*), to appoint another assistant to the Lord Chancellor, under the title of Vice-Chancellor of England; and after the transfer to this court, in 1841, of the equity business of the exchequer, two more Vice-Chancellors were added to its judicial list (*f*); each

Masters in Chancery, viz. those subordinate to the Master of the Rolls, were newly regulated by 3 & 4 Will. 4, c. 94, (amended by 10 & 11 Vict. c. 60). And see also 10 & 11 Vict. c. 97. But now by 15 & 16 Vict. c. 80, s. 59, these offices are abolished, with reservation, however, of the power of existing Masters to act in certain matters (see 17 & 18 Vict. c. 100), until they shall be respectively released by the Lord Chancellor from the performance of all duties;—and with a reservation also of the rights, duties, and privileges of the *accountant-general*, as a Master in Chancery.

(*c*) 3 Bl. Com. 450. See 7 Will. 4 & 1 Vict. c. 46, as to the full salary of the Master of the Rolls, and 1 & 2 Vict. c. 94, vesting in him the custody of the public records.

(*d*) 3 & 4 Will. 4, c. 94, s. 24.

(*e*) By stat. 53 Geo. 3, c. 24.

(*f*) By stat. 5 Vict. c. 5, s. 19. As to one of these Vice-Chancellorships, the Act provides that nothing therein contained shall authorize the appointment of a *successor*. The appointment of a successor, however, was authorized by 14 & 15 Vict. c. 4, and that of another successor, by 15 & 16 Vict. c. 80, ss. 52—58.

of whom sits, (like the Master of the Rolls,) separately from the Lord Chancellor. Another addition also has been recently made (*g*) of two judges called the lords justices of the Court of Appeal in Chancery (*h*); which court is to consist of the Lord Chancellor together with these judges, and possesses all the jurisdiction exercised by the Lord Chancellor himself, so far as his judicial business in Chancery is concerned, without prejudice, however, to his right to sit, as formerly, alone. To this court, (the powers of which may be exercised, not only by its full body, but by either of its judges, together with the Lord Chancellor, or by both the judges apart from the Lord Chancellor,) an appeal from the Master of the Rolls, and each of the Vice-Chancellors, may be referred: or may be entertained by the Lord Chancellor sitting alone in his proper jurisdiction; and from these appellate jurisdictions, an appeal in turn lies to the House of Lords.

VIII. [The next Court that shall be mentioned is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the Court of Exchequer Chamber;] which is subject to considerable variety in its form. For first it exists as a court of mere debate; [such causes from the other courts being sometimes adjourned into it, as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below (*i*).] And in such cases, it [consists of all the judges of the three Superior courts] of common law; [and now and then the lord chancellor also.] Considered as a court of error, in which light we are now principally concerned with it, it [was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common law side of the Court

(*g*) By 14 & 15 Vict. c. 83.

(*h*) The lords justices, (if privy councillors,) are also to be members of the Judicial committee of the privy council, as to which vide sup. vol. II. p. 470.

(*i*) 4 Inst. 119; Warraine *v.* Smith, 2 Bulst. 146.

[of Exchequer. And to that end it consisted of the lord chancellor and lord treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of which, a second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the Common Pleas and the barons of the Exchequer; before whom writs of error might be brought to reverse judgments in certain suits originally begun in the Court of King's Bench.] But both these constitutions are now abolished. For a royal commission having issued in 1828 to inquire into the pleadings and practice of the Superior courts of the common law, it recommended, among many other improvements, a new arrangement of this Court, which was afterwards carried into effect by 11 Geo. IV. & 1 Will. IV. c. 70, s. 8. According to this arrangement the judgments of each of the Superior courts of common law, in all suits whatever, are, (upon proceedings in error in law being instituted for the purpose,) subject to revision by the judges of the other two,—sitting collectively as a Court of error for that purpose, in the Exchequer Chamber. The composition of this Court consequently admits of three different combinations, consisting of any two of the Courts below, viz. those which were not parties to the judgment supposed to be erroneous.

From each combination of this Court (*k*), proceedings in error may be taken into

IX. [The House of Lords; which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only] in case of appeal, or proceedings in error, [to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over

(*k*) See 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

[which the great officers who accompanied these barons were respectively delegated to preside,—it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived.] They are therefore generally, in all causes of common law or equity, commenced in any court of England, (subject however to certain exceptions (*l*),) a tribunal of appeal, (that is either originally, or after the intervention of a previous appeal to another court, as the case may be); and they are also in all such causes [the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide; and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them: since upon their decision all property must finally depend (*m*).]

[Hither may also be referred the tribunal established by statute 14 Edw. III. c. 5, consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and

(*l*) There is no appeal to the Lords from the Ecclesiastical, Maritime, or Prize Courts in England; nor from Man, Jersey, Guernsey, Sark, or Alderney; nor from the colonies;—the appeal in these cases being to the Queen in Council. And the appeal from a court-martial is to the Queen in person: as is also the appeal from the Lord Chancellor, in matters of idiotcy or lunacy. From the Court of the Stannaries, too, the final appeal is not to the Lords, but to the Judicial Committee of the Privy Council, vide post, p. 438.

(*m*) From the courts of Scotland and Ireland, as well as from those of England, the appeal is to the House of Lords. As to appeals from Scotland, see 6 Ann. c. 26, s. 12; 48 Geo. 3, c. 151; 53 Geo. 3, c. 64; 59 Geo. 3, c. 35; 4 Geo. 4, c. 85. As to those from Ireland, 23 Geo. 3, c. 28; 39 & 40 Geo. 3, c. 67, art. 8.

[(with the advice of the chancellor, treasurer, and justices of both benches) to give directions for remedying these inconveniences in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during any long intermission or recess of parliament; for the statute further directs, that if the difficulty be so great that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls and barons unto the *next* parliament, who shall finally determine the same.]

X. We have next to notice a tenth [species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; namely, the Courts of Assize and *Nisi prius*.

These are composed of two or more commissioners,] called judges of assize (or of assize and *nisi prius*), [who are twice in every year (*n*) sent, by special commission from the crown], on *circuits* [all round the kingdom, to try by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall;]—there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, before the chief or other judges of the superior courts, at what are called the London and Westminster *sittings* (*o*). [These judges of assize came into use in the room of the antient justices in eyre, *justiciarii in itinere;* who were regularly established, if not first appointed, by the Parliament of

(*n*) Occasionally a third circuit is appointed in the course of the year, for the purpose of gaol delivery.

(*o*) The times for these sittings are now fixed by the superior courts under 17 & 18 Vict. c. 125, s. 2 ("The Common Law Procedure "Act, 1854"). They were formerly regulated by the following statutes: 18 Eliz. c. 12; 12 Geo. 1, c. 31; 24 Geo. 2, c. 18; 1 Geo. 4, cc. 21, 55; 11 Geo. 4 & 1 Will. 4, c. 70, s. 7.

[Northampton, A.D. 1176, in the twenty-second year of Henry the second (*p*), with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes (*q*). They were afterwards directed by *Magna Charta*, c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assises; the most difficult of which they are directed to adjourn into the Court of Common Pleas to be there determined. The itinerant justices were sometimes mere justices of assize, or of dower, or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*r*): but the present justices of assize and *nisi prius* are more immediately derived] from the statute of Westminster the second, (13 Edw. I. c. 30,) and consist principally of the judges of the superior courts of common law, to whom the duty is confided of thus superintending the trial of matters of fact, at the courts of assizes and *nisi prius* (*s*),—as well as that of deciding matters of law, and transacting other judicial business at their sittings *in banc* (as they are called), that is, on the bench of their respective courts at Westminster. For by the above-mentioned sta-

(*p*) Seld. Jan. l. 2, s. 5; Spelm. Cod. 329.

(*q*) Co. Litt. 293.—"*Anno* 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistæ;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt.*"—(Annal. Eccl. Wigorn. in Whart. Angl. Sacr. i. 495.)

(*r*) Bract. l. 3, tr. 1, c. 11.

(*s*) A new collateral duty of a very different kind is now assigned to the judges of assize. By 20 & 21 Vict. c. 77, s. 17, a petition for restitution of conjugal rights or for judicial separation under that Act, may be made by either husband or wife, not only to the "Court for Divorce and Matrimonial Causes," but to the judge of assize, at the assizes held for the county in which the husband and wife reside, or last resided, together. The judge of assize, however, may refer such petition to any Queen's counsel, or serjeant at law, named in the commission of assize or *nisi prius*.

tute of 13 Edw. I. c. 30, the judges of assize and *nisi prius* are to be [assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county:—by statute 27 Edw. I. c. 4, (explained by 12 Edw. II. c. 3,) assises and inquests are allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county:—by statute 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench, (though the plea be not depending in his own court,) or before the chief baron of the Exchequer, if he be a man of the law; or otherwise before the justices of assize, so that one of such justices be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn:]—and, lastly, by 2 & 3 Vict. c. 22, all justices of assize may on their respective circuits try causes pending in the Court of Exchequer, without issuing, (as it had till then been considered necessary to do,) a separate commission from the Exchequer for that purpose. [They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of Lent, by consent of the bishops at the king's request, as expressed in statute Westminster the first, 3 Edw. I. c. 51 (*t*). And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of assize to administer oaths in holy times: for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance (*u*). The prudent jealousy of our ancestors ordained (*x*), that no man of law should be judge of assize in his own county, wherein he was born, or doth inhabit; and a similar prohibition is found in the civil law (*y*), which has carried this principle so far, that it is

(*t*) Vide post, chap. x.

(*u*) Instances hereof may be met with in the Appendix to Spelman's Original of the Terms, and in Parker's Antiquities, 209.

(*x*) Stat. 4 Edw. 3, c. 2; 8 Rich. 2, c. 2; 33 Hen. 8, c. 24.

(*y*) Ff. 1, 22, 23.

[equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connexion (*z*).] But in modern times, this prohibition, always inconvenient, has been also deemed unnecessary; the apprehensions on which it is founded being sufficiently obviated by the high character and position of our judges. By statute 12 Geo. II. c. 27, and 49 Geo. III. c. 91, it is consequently abolished.

[The judges upon their circuits,] (which are eight in number (*a*),) [now sit by virtue of] four (*b*) [several authorities. 1. The commission of the *peace* (*c*). 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol delivery*.—The consideration of all which belongs properly to the subsequent book of these Commentaries. The other authority is, 4. That of *nisi prius* (*d*), which is a consequence of the] antient [commission of *assise* (*e*), being annexed to the office of justices of assize by the statute of Westminster the second (13 Edw. I. c. 30); and it empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury (*f*). These, by the antient course of the courts, were usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize should come into the county in question,] which in modern times they have invariably done in the vaca-

(*z*) C. 9, 29, 4.

(*a*) These are the Home—the Midland—the Norfolk—the Oxford—the Northern—the Western—the North Wales—and the South Wales Circuit.

(*b*) Blackstone (vol. 3, p. 60) enumerates five, (including the *commission of assise*,) but the recent abolition of assises, and other real actions have thrown the commission of assise, as distinguished from the commission of nisi prius, out of force.

(*c*) Vide sup. vol. II. p. 648.

(*d*) As to the officers of *nisi prius* and their fees, see 15 & 16 Vict. c. 73.

(*e*) Bullock *v.* Parsons, Salk. 454.

(*f*) The judges have also commission to try issues of fact arising in causes depending in the Court of Common Pleas at Lancaster. (See 18 & 19 Vict. c. 45.)

tions preceding, so that the trial has always in fact taken place before those judges. And now by the effect of the statute 15 & 16 Vict. c. 76 (*g*) ("The Common Law Procedure Act, 1852"), the course of proceeding is no longer even ostensibly connected with a proviso at *nisi prius*, but the trial is allowed to take place, without the use of any such words in the process of the court, and as a matter of course, before the judges sent under the commission into the several counties. [These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward the first and Edward the second before mentioned; whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c., that a sufficient supply of commissioners may never be wanting (*h*). But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes;* directing, that if all cannot be present, any two of them (a justice or serjeant being one) (*i*) may proceed to execute the commission (*k*).]

(*g*) See 15 & 16 Vict. c. 76, s. 104, abolishing the jury process of *distringas juratores*, in the award of which the proviso of *nisi prius* used to be inserted.

(*h*) As to the payment of the clerks of assize by salary instead of fees, see 15 & 16 Vict. c. 73; 17 & 18 Vict. c. 35, s. 20.

(*i*) By 13 & 14 Vict. c. 25, any person being one of her majesty's counsel, or a barrister at law with patent of precedence, may be named in the commission, though he be not of the degree of the coif.

(*k*) By 1 Geo. 4, c. 55, s. 5, any judge or baron of the Exchequer may amend a record, and make an order in a cause on circuit, whether in a suit depending in his own court or not. By 3 Geo. 4, c. 10, the commission of the judges on circuit may be opened on the next day to the one appointed, or if that be a Sunday, &c. then on the day following. By 3 & 4 Will. 4, c. 71, the places at which assizes may be held may be fixed by order in council. By 7 Will. 4 & 1 Vict. c. 24, (amending 7 Geo. 4, c. 63,) provisions are made as to building, &c. shire halls for holding the assizes. By 17 & 18 Vict. c. 35, a former enactment for dividing the county of Warwick into two assize

These are the courts of general jurisdiction for the determination of ordinary causes and matters, whether arising at law or in equity; but there are other courts whose province, though more special and peculiar as regards the subject-matter of litigation, are yet of jurisdiction equally general in respect of place and person; and the present chapter would consequently be incomplete without taking notice of their existence. The courts to which we refer are *the Court of Bankruptcy; the Insolvent Court; the Court of Probate; and the Court for Divorce and Matrimonial Causes* (*l*). But this bare mention of them will suffice for the present purpose,—as we have already given, in the course of our second volume, such account of their constitution and course of proceeding as the nature of this work requires.

districts, and for holding assizes at Coventry, is repealed, and the assizes are to be held at Warwick only.

(*l*) Vide sup. bk. II. pt. II. cc. VI. VII.; bk. III. c. II. Among the courts for the determination of "ordinary causes and matters at law or in equity" (arising within this country at least), we cannot rank the *Privy Council*, or that branch of it called the *Judicial Committee*. An account of these will be found in their proper places, sup. bk. IV. c. V.; post, bk. V. c. V.

CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.



[Besides the several courts which were treated of in the preceding chapter, and in which all injuries are redressed, that fall under the cognizance of] common law, or equity, there still remain some other courts of a jurisdiction equally general; but which give redress for no injuries but those of an ecclesiastical, military, and maritime nature; [and therefore are properly distinguished by the title of Ecclesiastical Courts, Court Military, and Courts Maritime.]

I. Ecclesiastical Courts. [Before we descend to consider particular courts of this description, it must be premised in general, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction; the county court was as much a spiritual as a temporal tribunal: the rights of the Church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, (or in his absence, the sheriff) of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil; a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal (a). This union of power was] in some respects, it may be presumed, [very

(a) "*Celeberrimo huic conventui episcopus et aldermannus intersunto; quorum alter jura divina, alter humana populum edoceto.*"—Wilk. Leg. Angl. Sax. LL. Eadg. c. 5.

[advantageous to them both: the presence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decree on such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesiastical jurisdiction only; which jurisdiction was supposed to be lodged in the first place and immediately in the Pope, by divine indefeasible right and investiture from our Saviour himself; and derived from the Pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi*" (*b*); and places an emphatical reliance on a fabulous tale which it tells of the Emperor Constantine; that when some petitions were brought to him imploring the aid of his authority against certain of his bishops accused of oppression and injustice, he caused (says the holy canon), the petitions to be burnt in their presence, dismissing them with this valediction; "*Ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos*" (*c*).

It was not, however, till after the Norman conquest, that this doctrine was received in England; when William the first, (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy, and planted in the best preferments of the English Church,) was at length prevailed upon to establish this fatal incroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by

(*b*) Decret. part 2, caus. 11, qu. 1, c. 41. (*c*) Ibid.

[those of a more refined policy, in order to discountenance the laws of King Edward, abounding with the spirit of Saxon liberty, is not altogether certain. But the latter, if not the cause, was undoubtedly the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the Conqueror (*d*), which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law (*e*).

King Henry the first, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts (*f*); which was, according to Sir Edward Coke (*g*), only a restitution, after the great heat of the conquest was past, of the antient law of England. This, however, was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate Archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates; and therefore in their

(*d*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. Leg. Angl. Sax. 292.

(*e*) "*Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred placita teneant, nec causam quæ ad regimen animarum pertinet ad judicium secularium hominum adducant: sed quicunque secundum episcopales leges, de quâcunque causâ vel culpâ interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causâ vel culpâ suâ respondeat; et non secundum hundred, sed secundum canones et episcopales leges, rectum Deo et episcopo faciat.*"—Wilk. Leg. Angl. Sax. 292.

(*f*) "*Volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerint tempore regis Edwardi.*" (Cart. Hen. 1, in Spelm. Cod. Vet. Legum, 305.) And what is here obscurely hinted at, is fully explained by his code of laws extant in the Red Book of the Exchequer, though in general but of doubtful authority. (Cap. 8.) "*Generalia comitatuum placita certis locis et vicibus teneantur. Intersint autem episcopi, comites, &c.; et agantur primo debita veræ christianitatis jura, secundo regis placita, postremo causæ singulorum dignis satisfactionibus expleantur.*"

(*g*) 2 Inst. 70.

[synod at Westminster, in the third year of Henry the first, they ordained that no bishop should attend the discussion of temporal causes (*h*); which soon dissolved this newly-effected union. And when, upon the death of King Henry the first, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (*i*). And as it was about that time that the contest and emulation began between the laws of England and those of Rome (*k*), the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding; this widened the breach between them, and made a coalition afterwards impracticable, which probably would else have been effected at the general reformation of the Church.]

The ecclesiastical (or spiritual) courts, or, as they are often styled, courts christian (*curiæ christianitatis*), are for the administration of justice in ecclesiastical matters; that is, matters in some sense connected with the Church. Their dominion indeed has hitherto been much more extensive, as it has always been permitted to comprise matters *testamentary* and *matrimonial;* which can scarcely be said to be of the character above described. But by the recent acts of 20 & 21 Vict. cc. 77, 85, these are now withdrawn from the jurisdiction of the ecclesiastical courts (*l*). In recounting the various species of these courts [we shall begin with

(*h*) "*Ne episcopi sæcularium placitorum officium suscipiant.*"—Spelm. Cod. 301.

(*i*) Spelm. Cod. 310.

(*k*) Vide sup. vol. I. p. 12.

(*l*) The effect of this will be to set aside altogether one of these tribunals, viz. the *Prerogative Court;* which was, in each province, held before a judge appointed by the archbishop, for administering justice in testamentary matters (viz. those relating to probate and administration), and in those only. Its jurisdiction arose in the case (an extremely frequent one) where the deceased left *bona notabilia* in different dioceses. As in this case the matter could not be disposed of in any single diocese, the archbishop claimed the jurisdiction by way of special *prerogative.*

[the lowest, and so ascend gradually to the supreme court of appeal (*m*).

1. The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity.] It is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his official. Its jurisdiction comprises ecclesiastical causes in general, arising within the archdeaconry: and in ordinary cases the party may commence his suit either in this court or the bishop's; though in some archdeaconries the suit must be commenced in the former, to the exclusion of the latter (*n*). From the archdeacon's court an appeal generally lies, by 24 Hen. VIII. c. 12, to that of the bishop.

2. [The Consistory Court] of the bishop is held in the several cathedrals, for the trial of all ecclesiastical causes arising within the several dioceses (*o*). The chancellor of the diocese (or his commissary) is the judge; [and from his sentence an appeal lies, by virtue of the same statute of Henry the eighth, to the archbishop of each province respectively.]

3. [The Court of Arches is a court of appeal belonging to the archbishop of Canterbury, whereof the judge, (who sits as deputy to the archbishop,) is called the *Dean of the Arches;* because he antiently held his court in the church of St. Mary-*le-bow* (*Sancta Maria de arcubus*), though all the principal spiritual courts are now holden at Doctors' Commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in

(*m*) For further information as to these courts and the particular matters cognizable in them, vide post, bk. v. c. XIII. et vide *Oughton's Ordo Judiciorum;* Bac. Ab. tit. Courts; Burn's Ecclesiastical Law; R. v. Thorogood, 12 A. & E. 183; R. v. Baines, ibid. 210; Report of the Commissioners on Ecclesiastical Courts, dated 15th February, 1832.

(*n*) See Woodward v. Fox, 2 Vent. 267; Godolph. 61.

(*o*) As to the e t on the local limits of the bishop's jurisdiction of the 6 & 7 Will. 4, c. 77, see 10 & 11 Vict. c. 98 (continued by 20 Vict. c. 10); Powell v. Hibbert, 15 Q. B. 129; Phelps v. St. John, 10 Exch. 895.

[London; but the office of Dean of the Arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the official principal of the archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province.] Many suits, also, are brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request* (*p*). From the Court of Arches, and from the parallel court of appeal in the province of York, an appeal lies to the Privy Council, as we shall presently have occasion to show at greater length (*q*).

4. [The Court of Peculiars is a branch of, and annexed to, the Court of Arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions (*r*) are originally cognizable by this court;] from which an appeal lies to the Court of Arches (*s*).

[We have here passed by such ecclesiastical courts as have only what is called a *voluntary*, and not a *contentious*, jurisdiction, which are merely concerned in doing or settling what no one opposes, and keeping an open office for that purpose (as granting dispensations, licences, faculties, and other remnants of the papal extortions), but do not con-

(*p*) 2 Chit. Gen. Prac. 496; see Burgoyne *v.* Free, 2 Add. 406. Ex parte Denison, 4 Ell. & Bl. 292.

(*q*) Vide post, p. 426.

(*r*) *Benefices*, "exempt or peculiar," are nevertheless (so far as the Act relative to pluralities and residence is concerned) to be subject to the jurisdiction of the archbishop or bishop within whose province or diocese they are locally situate. (1 & 2 Vict. c. 106, s. 108.)

(*s*) See Parham *v.* Tempter, 3 Phil. Ecc. Rep. 223.

[cern themselves with administering redress to any injury;] and shall proceed to— . .

5. The great court of appeal in all ecclesiastical causes, viz. the Privy Council (*t*). This has been substituted in our own times for the former appeal court, viz. the Court of Delegates,—[*judices delegati*, appointed by commission under the Great Seal, and issuing out of Chancery, to represent the royal person,] and hear the appeal. This Court of Delegates, in ordinary cases, consisted of three puisne judges, (one from each of the superior common law courts,) and three or more civilians (*u*); and was held by virtue of the statute 25 Hen. VIII. c. 19, by which all manner of appeals were authorized to be had and prosecuted from the archbishops' courts to the sovereign in chancery (*x*). [Prior to that statute the appeal was to the Pope. Appeals to Rome, indeed, were always looked upon by the English nation, even in the times of popery, with an evil eye, as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced, in very turbulent times, in the sixteenth year of King Stephen (A.D. 1151), at the same period, (Sir Henry Spelman observes,) that the civil and canon laws were first imported into England. But in a few years after, to obviate this growing practice, the Constitutions made at Clarendon, in the eleventh year of Henry the second, on account of the disturbances raised by Arch-

(*t*) See 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41, s. 3; 6 & 7 Vict. c. 38; 7 & 8 Vict. c. 69, ss. 9, 12. It has been recently determined that the appeal from the archbishop's court, in a case where the crown is concerned (as well as in other cases), is to the Privy Council, and not to the upper house of convocation. (See Gorham *v.* Bishop of Exeter, 15 Q. B. 52.)

(*u*) Special Report on Ecclesiastical Courts, dated 25th January, 1831.

(*x*) A commission of *review* was sometimes granted to revise the sentence of the Court of Delegates in extraordinary cases; but no appeal lay from it, as a matter of right. (See 26 Hen. 8, c. 1; 1 Eliz. c. 1; 3 Bl. Com. 67.)

[bishop Becket and other zealots of the holy see, expressly declare, that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any further without special licence from the crown (*y*). But the unhappy advantage that was given, in the reigns of King John and his son Henry the third, to the encroaching power of the Pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome, in causes ecclesiastical, so strongly, that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry the eighth, when all the jurisdiction usurped by the Pope in matters ecclesiastical was restored to the Crown, to which it originally belonged; so that the statute of the twenty-fifth year of Henry the eighth was but declaratory of the antient law of the realm (*z*).] The Court of Delegates, however, is now superseded (*a*), and by 2 & 3 Will. IV. c. 92, it is provided, that every person who might formerly have appealed under 25 Hen. VIII. c. 19, may, for the future, appeal to her Majesty in council: and, by 3 & 4 Will. IV. c. 41, s. 3, 6 & 7 Vict. c. 38, s. 11, and 7 & 8 Vict. c. 69, s. 9, that her Majesty by order in council may direct that all appeals from ecclesiastical or other courts shall be referred to the Judicial Committee of the privy council (*b*).

[These are now the principal courts of ecclesiastical jurisdiction; none of which,] except perhaps the last, [are allowed to be courts of record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, viz. the Court of the King's High Commission in

(*y*) Cod. Vet. Leg. 315.

(*z*) 4 Inst. 341.

(*a*) See the Special Report of the Commissioners appointed to inquire into the Ecclesiastical Courts, dated 25 Jan. 1831, in which this change was recommended.

(*b*) As to the Judicial Committee of the Privy Council, vide sup. vol. II. p. 471.

causes ecclesiastical. This court was erected and united to the regal power (c) by virtue of the statute 1 Eliz. c. 1, instead of a larger jurisdiction which had before been exercised under the Pope's authority. It was intended to vindicate the dignity and peace of the Church, by reforming, ordering and correcting the ecclesiastical state and persons; and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the shelter of which very general words, means were found, in that and the two succeeding reigns, to vest in the high commissioners, extraordinary and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. I. c. 11. And the weak and illegal attempt that was made to revive it during the reign of King James the second, served only to hasten that infatuated prince's ruin.

II. Next, as to the Court Military (d). The only court of this kind known to, and established by, the permanent laws of the land, is the Court of Chivalry, formerly held before the lord high constable and marshal of England jointly; but since the attainder of Stafford, Duke of Buckingham, under Henry the eighth, and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been held before the earl marshal only (e). This court, by statute 13 Rich. II. c. 2, hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. And from its sentence an appeal lies imme-

(c) 4 Inst. 324.

(d) For further information as to this court, and the particular matters cognizable therein, vide post, bk. v. c. xiii.; bk. vi. c. xiv.; et Com. Dig. Courts (E); Bac. Ab. Courts, Court of Constable and Earl Marshal. As to the office of Earl Marshal of England, see the Posthumous Discourse of Mr. Camden on that subject.

(e) Parker's case, 1 Lev. 230; Show. Parl. Cas. 60.

[diately to the sovereign in person (*f*). This court was in great reputation in the times of pure chivalry, and afterwards, during our connexions with the continent, by the territories which our princes held in France:] but has long since fallen entirely out of use, [on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison; not being a court of record (*g*).]

III. [The Maritime courts (*h*), or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas or in parts out of the reach of the common law, are only the Court of Admiralty, and its court of appeal;] though in her Majesty's possessions beyond the seas there are also established courts, with jurisdiction over maritime causes, (including those relating to prize,) under the denomination of Courts of Vice-Admiralty (*i*). The Court of Admiralty is held before the judge of the admiralty (*k*); who has besides a special commission from the crown to adjudicate on *prize of war* (*l*), and power

(*f*) 4 Inst. 125.

(*g*) Chambers *v.* Jennings, 7 Mod. 127.

(*h*) For further information as to these courts, and the particular matters cognizable therein, vide post, bk. v. c. XIII.; et Com. Dig. Admiralty Courts; Bac. Ab. High Court of Admiralty; Re Blanshard, 2 B. & C. 244.

(*i*) By 2 Will. 4, c. 51, it is enacted, that in all cases where a ship comes within the local limits of a court of vice-admiralty, suits may be commenced therein for "seamen's "wages, pilotage, bottomry, damage "to ships by collision, breach of re-"gulations of his majesty's service "at sea, salvage, and droits of admi-"ralty," notwithstanding the cause of action may have arisen out of the local limits of such court.

(*k*) This judge sat properly as the deputy of the lord high admiral of England, while an officer of that description was in use. By 20 & 21 Vict. c. 77, s. 10, it is provided that upon the next vacancy in the office of the Admiralty Court, the two offices of judge of that court, and judge of the court of probate, may be united and held by the same person.

(*l*) 2 Chit. Gen. Pr. 538 a; 1 Doug. 594; Lindo *v.* Rodney, 2 Doug. 613, (n.); Mitchell *v.* Rodney, (in error), 2 Bro. P. C. 423; Faith *v.* Pearson, 6 Taunt. 439. (See the temporary Act of 17 & 18 Vict. c. 18, called the Prize Act, Russia, 1854.)

also to decide on questions of *booty of war* (i. e. prize on shore), when specially referred to him by her Majesty (*m*). [According to Sir Henry Spelman (*n*) and Lambard (*o*), this court was first of all erected by King Edward the third.] Like the other courts before mentioned in this chapter, [it is no court of record (*p*).]

From the sentence of the admiralty judge, the appeal use to lie in general to the Court of Delegates (*q*); and from the vice-admiralty courts might be brought either before the Court of Admiralty in England, or the sovereign in council (*r*). [But in case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty and vice-admiralty as lawful prize, the appeal lay to certain commissioners consisting chiefly of the privy council, and called lords commissioners in prize cases. And this by virtue of divers treaties with foreign nations, by which particular courts are established in all the maritime countries of Europe, for the decision of this question, "whether lawful prize or not?" for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it.] By 2 & 3 Will. IV. c. 92, however, the appellate jurisdiction of the delegates was transferred to the sovereign in council. And by 3 & 4 Will. IV. c. 41, s. 2, all appeals in prize suits, and all other

(*m*) 3 & 4 Vict. c. 65, s. 22.

(*n*) Gloss. 13.

(*o*) Archeion, 41.

(*p*) 3 Bl. Com. p. 69. By 3 & 4 Vict. c. 65, various provisions are made to improve the practice and extend the jurisdiction of this court; and by c. 66, the respective salaries of the officers therein are regulated. See also 13 & 14 Vict. cc. 26, 27, as to its jurisdiction in questions arising on the capture of pirates;—17 & 18 Vict. c. 19, ("The Naval Pay and Prize Act, 1854,") as to its jurisdiction in cases of prize;—17 & 18 Vict. c. 78, ("The Admiralty Court Act, 1854,") as to its practice in various particulars;—17 & 18 Vict. c. 104, ("The Merchant Shipping Act, 1854,") ss. 1, 460, 464, 476, 486, 498, as to its jurisdiction in cases of salvage. As to the power of the Court of Chancery to restrain its proceedings, see Glasscot *v.* Lang, 8 Sim. 388.

(*q*) As to the Court of Delegates, vide sup. p. 426.

(*r*) 3 Bl. Com. 69.

proceedings in the courts of admiralty or vice-admiralty courts, or any other court abroad, which might then be made to the High Court of Admiralty in England, or to the lords commissioners in prize cases, were directed in future to be also made to the sovereign in council; and not to the High Court of Admiralty in England, or such commissioners as aforesaid. And by the latter statute, and by 6 & 7 Vict. c. 38, and 7 & 8 Vict. c. 69, the Privy Council may refer all such appeals to the Judicial Committee (*s*). But it is provided, that nothing in the 3 & 4 Will. IV. c. 14, contained, shall impeach any treaty or engagement with a foreign power, by which it shall be stipulated that the appeal, in cases of prize, shall belong to another jurisdiction; but that the judgments of any persons appointed by such treaty shall be of the same force as if the Act had not been passed.

(*s*) As to the Judicial Committee, vide sup. vol. II. p. 471.

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

[In the two preceding chapters we have considered the several courts whose jurisdiction is general; and which are so contrived, that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remain certain others, whose jurisdiction is special, confined to particular spots,] or districts of the realm. These are,

I. One species of restricted courts is that of Commissioners of Sewers. [This is a temporary tribunal erected by virtue of a commission under the great seal, which formerly used to be granted *pro re nata* at the pleasure of the crown (*a*); but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers, 23 Hen. VIII. c. 5 (*b*).] The jurisdiction of the Commissioners is to overlook the repairs of the banks and walls of the sea coast and navigable rivers; or, with consent of a certain proportion of the owners and occupiers, to make new ones; and to cleanse such rivers, and the streams communicating therewith (*c*):

(*a*) F. N. B. 113.

(*b*) This act was made perpetual by 3 & 4 Edw. 6, c. 8, and amended by 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45, and 12 & 13 Vict. c. 50. As to the construction of the act of Hen. 8, see Callis on Sewers; Emerson *v.* Saltmarshe, 7 Ad. & El. 266; Taylor *v.* Loft, 8 Exch. 269. As to the management of the sewers of the *Metropolis*, see 18 & 19 Vict. c. 120, ss. 146—148.

(*c*) By 3 & 4 Will. 4, c. 22, s. 10, the nature of the banks, streams, &c. falling within the jurisdiction of the commissioners is defined. And see further as to the extent of their power, sects. 19, 21.

and their powers are [confined to such county or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts (*d*); and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh (*e*), or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary: and if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5, sell his freehold lands (and by the 7 Ann. c. 10, his copyhold also) in order to pay such scots or assessments.] By 4 & 5 Vict. c. 45, they are also empowered, for the purpose of defraying such expenses incident to the commission as in the Act particularized, to tax in the gross in each parish, such lands as are within the jurisdiction, but so that such lands shall contribute thereto in proportion to the benefit received as compared with the lands of the other parishes—which tax shall be denominated the General Sewers Tax, and be recoverable by distress and sale (*f*). [But their conduct is under the control of the Court of Queen's Bench, which will prevent or punish any illegal or tyrannical proceedings (*g*). And yet in the reign of King James the first (8th Nov. 1616), the privy coun-

(*d*) See Inhabitants of Oldbury *v.* Stafford, 1 Sid. 145.

(*e*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)

(*f*) As to the sewers rates, see also 3 & 4 Will. 4, c. 22; 12 & 13 Vict. c. 50, ss. 2, 7.

(*g*) Hetley *v.* Sir J. Boyer, Cro. Jac. 336.

[cil took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings (*h*). The pretence for which arbitrary measure was no other than the tyrant's plea (*i*) of the *necessity* of unlimited powers in works of evident utility to the public, "the supreme "reason above all reasons, which is the salvation of the "king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of the Court of Queen's Bench (*k*).]

II. [The Court of the Duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy, or his deputy, concerning all matter of equity relating to lands holden of the crown in right of the duchy of Lancaster (*l*): which is a thing very distinct from the county palatine, (which hath also its separate chancery, for sealing of writs and the like (*m*),) and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the High Court of Chancery (*n*); so

(*h*) Moor, 825, 826.

(*i*) Milt. Parad. Lost, iv. 393.

(*k*) Smith's case, 1 Ventr. 66; The Case of Cardiff Bridge, Salk. 146.

(*l*) Owen *v.* Holt, Hob. 77; Fisher *v.* Patten, 2 Ley. 24. The 13 & 14 Vict. c. 60 (the "Trustee Act, 1850"), is, by its 21st section, made applicable to this court. In certain mining districts belonging to the duchy, there are also courts called the Barmote Courts, for regulation of the mines, and for deciding questions of title and other matters relating thereto. See as to these courts, 14 & 15 Vict. c. 94.

(*m*) Fisher *v.* Patten, 1 Vent. 157. See 13 & 14 Vict. c. 43.

(*n*) 4 Inst. 206.

[that it seems not to be a court of record: and, indeed, it has been holden that the High Court of Chancery has a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes (*o*).

* * *

III. Another species of private courts, which are of a limited local jurisdiction, are those which appertain to the counties palatine of Lancaster and Durham (*p*),] viz., the Palatine Courts of Common Pleas and of Chancery;—which have respectively cognizance of matters both of law and equity (*q*). As to these counties, indeed, we may further remark that they have not only these their proper courts, but were formerly exempt from the ordinary jurisdiction of the superior courts at Westminster. [For, as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice by their own judges appointed by themselves, and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court, in what manner to administer justice between the suitors.] And even after these franchises were re-united to the crown, yet still the maxim continued to prevail, that the ordinary writs do not run into a county palatine; and therefore all process issuing out of the superior courts of common law at Westminster, and intended to be executed in one of these counties, used to be directed in the first instance to the chancellor thereof, who thereupon issued his mandate to the sheriff. And the judges of assize who sit therein, still [sit by virtue of a

(*o*) 1 Chan. Rep. 55; Toth. 145; Hard. 171.

(*p*) 4 Inst. 213, 218; Finch, R. 452.

(*q*) The proceedings in these courts are now regulated by modern statutes, and assimilated for the most part to the proceedings of the superior courts at Westminster. The statutes are cited sup. vol. I. p. 130. See also as to these courts, Potter *v.* Moss, 5 Tyrw. 513; Byrne *v.* Fitzhugh, 8 Dowl. P.C. 278. Blackstone speaks also of the county palatine of Chester, and of the royal franchise of Ely, but these courts are now abolished; vide sup. vol. I. pp. 130, 133.

[special commission from the crown, as owner of the franchise, and under the seal thereof; and not by the usual commission under the Great Seal of England.] But in other respects the former practice is altered; for now, by 15 & 16 Vict. c. 76, (the Common Law Procedure Act, 1852,) all writs issuing out of the superior courts of the common law at Westminster, to be executed in the counties palatine, shall be directed and delivered to the sheriff, and executed and returned by him; and all records of the superior courts shall be brought to trial, and entered and disposed of in the counties palatine in the same manner as in other counties (*r*). The common law court, (or court of Common Pleas,) in Lancaster and in Durham, is a court of record; and proceedings in error may be taken from its judgments into the court of Queen's Bench (*s*): which is to be considered as [an ensign of superiority reserved to the crown at the original creation of the franchises.]

IV. The Court for the Stannaries of Cornwall and Devon, for the administration of justice among the tinners therein, is also a court of record of the same limited nature as those of the counties palatine (*t*). It is held before a judge called the vice-warden; and it is founded on an antient privilege granted to the workers in the tin

(*r*) 15 & 16 Vict. c. 76, ss. 122, 103.

(*s*) See 17 & 18 Vict. c. 125, s. 102. Formerly a jurisdiction in appeal from the *chancery* court of the county palatine of Lancaster, was exercised by the chancellor of the duchy and county palatine, in the court of the duchy chamber at Westminster, sitting with two judges of assize for the county at the time being; but by 17 & 18 Vict. c. 82, the chancellor of the duchy and county palatine and the two lords justices of appeal in the High Court of Chancery are made the court of appeal from the chancery court of Lancaster.

(*t*) There were formerly other courts of a nature analogous to that of the counties palatine, viz. the courts of the *cinque ports* (vide sup. vol. II. p. 511, n. (*a*); 4 Inst. 244; Jenk. 71; Ting *v.* Merewether, 1 Sid. 356); but the jurisdiction and authority of these courts in relation to civil suits and proceedings, are now abolished by 18 & 19 Vict. c. 48, ss. 1, 2 (amended by 20 & 21 Vict. c. 1).

mines, to sue and be sued in their own court, [that they may not be drawn from their business, which is highly profitable to the public, by attending their lawsuits in other courts (*x*). The privileges of the tinners are confirmed by a charter of the thirty-third year of Edward the first, and fully expounded by a private statute (*y*), 50 Edw. III., which has since been explained by a public Act, 16 Car. I. c. 15;] and their courts, which were formerly several for the several stannaries, are now united into one, and regulated by recent statutes (*z*). What relates to our present purpose is only this: that all tinners (*a*) and labourers in and about the stannaries shall, during the time of their working therein *bonâ fide*, be privileged to be sued in this court in all matters arising within the stannaries, excepting pleas of land, life, and member (*b*). No writ of

(*x*) 4 Inst. 232.

(*y*) See this at length in 4 Inst. 232.

(*z*) See 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83, and 18 & 19 Vict. c. 32; Carew's Hist. of Cornwall, Doderidge's Hist. of Cornwall, p. 94; Rowe *v.* Brenton, 8 B. & C. 737; Harvey *v.* Gilbard, 1 W. W. & H. 552.

(*a*) See also as to workers in mines of *lead and copper*, &c., 6 & 7 Will. 4, c. 106.

(*b*) Until the establishment of the modern county courts, the *actual labourers* were privileged *not to be sued in any other* court than those of the stannaries, in matters arising within the stannaries. In a convocation or parliament of tinners, held at Truro, 15th August, 12 Car. 1, article 5, it is said, "We present "and affirm, that by our antient "custom the spalliard working with "pick and shovel, the waterman, "the boll or barrow-man, the dress-"er, the blower, and all other tin-"ners, labourers and workmen that "necessarily attend getting the "tin, or the dressing, blowing, or "whitening it, so long as they con-"tinue their working without fraud, "are properly called *privileged tin-"ners*, and are *not to sue or be sued* "out of the *stannary courts*, saving "in case of life, land, or limb. And "we further present and affirm, that "all the said former *privileged tin-"ners*, if they shall discontinue their "working about tin and tin-works, "and also all the *officers* and minis-"ters of both courts, the *affeerers*, "the *owners of tin works* in wastral "or several, the *adventurers* in tin "works, the *buyers* of black or white "tin, and generally all others that "*intermeddle with tin*, are called *tin-"ners at large*, and have also the li-"berty, privilege, and benefit to sue, "and may be sued in the stannary "courts, for matters there determin-"able, and *may also sue and be sued* "*at the common law, at the pleasure* "*of the plaintiff*." (Laws of the

error lies from hence to any of the superior courts (*c*); but it is now recently enacted by 18 & 19 Vict. c. 32, that from all decrees and orders of the vice-warden on the equity side of his court, and from all judgments of the vice-warden on the common law side thereof, there shall lie an appeal to the lord-warden, (assisted by two or more assessors, members of the judicial committee of the privy council, or judges of the high court of chancery or courts of common law at Westminster); and from the lord-warden, a final appeal to the judicial committee (*d*).

V. [The several courts within the city of London (*e*), and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parlia-

Stannaries, p. 35.) But if a cause of action, where a tinner was party, arose *out* of the stannaries, it was always allowable to bring the action elsewhere (4 Inst. 231; Com. Dig. Courts, L. 1). And since the establishment of the modern county courts, the plaintiff has the option in all cases where tinners or labourers are parties, and where the cause of action arose within the stannaries, of suing either in the stannary court or in the county court within the district of which the cause of action arose. See 9 & 10 Vict. c. 95, s. 141; Newton *v.* Nancarrow, 15 Q. B. 144.

(*c*) See 4 Inst. 231. An appeal, however, formerly lay from the Cornwall stannary courts to the lord-warden, and from thence to the privy council of the Prince of Wales as Duke of Cornwall, and from thence to the sovereign. (3 Bl. Com. p. 80.)

(*d*) 18 & 19 Vict. c. 32, s. 26.

(*e*) The chief of those in London are as follows:—1. The *Court of Hustings*, which is the antient county court of London, but in which no actions can be brought that are merely personal. (Pulling's Laws of London.) 2. The *Lord Mayor's Court* (or Court of the Queen held before the Lord Mayor and Aldermen). As to this court, see Reg. *v.* Mayor of London, 16 L. J. (Q. B.) 185; Webb *v.* Hurrell, 4 C. B. 287; Day *v.* Paupierre, 7 D. & L. 12; 20 & 21 Vict. c. clvii; by which statute its practice and procedure are amended and its powers enlarged. In this court the recorder, or, in his absence, the common-serjeant, presides as judge (sect. 43 of the statute just cited); and from its judgments error may be brought in the exchequer chamber (sect. 4). 3. The *Sheriff's Court*, which has cognizance of personal actions, under the provisions of the London (City) Small Debts Act, 1852, and see 20 & 21 Vict. c. clvii, s. 3. As to the sheriff's court, see 11 & 12 Vict. c. lxxi; 15 & 16 Vict. c. lxxvii; 18 & 19 Vict. c. 122, s. 99; 20 & 21 Vict. c. clvii.

[ment, are also of the same private and limited kind (*f*).] Of these it may be said in general, that they arose originally from the favour of the Crown to those particular districts wherein we find them erected, upon the same principle that hundred courts and the like were established, for the convenience of the inhabitants, that they might prosecute their suits and receive justice at home:—that, for the most part, the superior courts at Westminster-hall have a concurrent jurisdiction with these, or else a superintendency over them (*g*); and are bound by the statute 19 Geo. III. c. 70, to give assistance to such of them as are courts of record, by issuing writs of execution on their judgments, where the person or effects of the defendant are not within the inferior jurisdiction (*h*):—and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the sovereign may erect new courts, yet he cannot alter the established course of law (*i*).]

(*f*) A detailed statement as to all the borough courts, county courts, courts of requests, and other local courts throughout the kingdom, as they existed previously to the 9 & 10 Vict. c. 95 (as to which Act, vide sup. p. 380),—showing the extent of their jurisdiction, the authority under which they were held, and their form of process, &c.—will be found in the Fourth Report of the Common Law Commissioners appointed in 1828, Appendix, Part II. As to the law relative to these courts, see Com. Dig. Courts (O), (P).

(*g*) Groenwelt *v.* Burwell, Salk. 144; S. C. 263. As to the removal of suits from such inferior courts generally, to the superior courts, see 1 & 2 Ph. & M. c. 63; 21 Jac. 1, c. 23; 19 Geo. 3, c. 70; 7 & 8 Geo. 4, c. 71; 1 & 2 Vict. c. 110, s. 22; 8 & 9 Vict. c. 127, s. 20.

(*h*) It was also provided by 1 & 2 Vict. c. 110, s. 22, with reference to such inferior courts as had for judges, at the time of the passing of that Act, barristers of seven years standing, that their judgments or orders for payment of money might be removed into a superior court, and be enforced there, as if originally recovered or made in such court. See as to the Mayor's Court of London, a similar provision, 20 & 21 Vict. c. clvii, s. 48.

(*i*) By 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), s. 228, her Majesty is empowered to direct from time to time, by order in council, that all or any part of the provisions of that Act, or of the rules made in pursuance thereof, shall apply to all or any courts of record in England or Wales; and a similar provision (sect. 105) is

It is also to be observed, that by the Municipal Act, 5 & 6 Will. IV. c. 76, the recorder is to be the judge in any court of record for civil actions in the boroughs to which the Act extends, if such court be not regulated by the provisions of any local Act, or if a barrister of five years' standing did not sit as a judge or assessor therein when the Municipal Act passed; and provisions are also contained to regulate the jurisdiction of such courts, and the qualification and summoning of jurors therein (*k*); and by 6 & 7 Will. IV. c. 105, s. 9, the recorder may, on occasion, appoint a deputy: and may make rules for the practice of such court, to be approved by the judges of the superior courts (*l*). Also by 7 Will. IV. & 1 Vict. c. 78, s. 35, the Crown may on the joint petition of the council of any borough, and the quarter sessions of the adjoining county, extend the jurisdiction of any court of record for civil actions within the borough, over any district adjacent to the borough, and within the jurisdiction of the quarter sessions. And by 2 & 3 Vict. c. 27, every court of record for civil actions within any borough shall be holden for the trial of issues of fact and of law, four times at least in each year,—and with no greater interval than four calendar months. From the borough courts of record a writ of error lies in general into the Court of Queen's Bench (*m*).

VI. [There is yet another species of private courts, which must not be passed over in silence,] viz. the Courts of the Universities of Oxford and Cambridge (*n*). To these

contained in 17 & 18 Vict. c. 125 ("The Common Law Procedure Act, 1854"). Several of such orders in council, in reference to particular borough and other courts, have already issued.

(*k*) 5 & 6 Will. 4, c. 76, s. 118, &c.; 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, ss. 32—36.

(*l*) Et vide 2 & 3 Vict. c. 27. The rules for the borough court of Wells have been printed; and those of all other borough courts are nearly the same.

(*m*) Vide sup. p. 396, n. (*k*).

(*n*) See 4 Inst. 227; Jenk. Cent. 2, pl. 88; Cent. 3, pl. 33; Hard. 504; Godbolt, 201; Hist. Com. Law, by Sir M. Hale, p. 33; Leasingby *v.* Smith, 2 Wils. 406; Cases temp. Hardw. 240; Williams *v.* Brickenden, 11 East, 543; Browne *v.* Renouard,

learned bodies antient royal grants have been made, (confirmed by act of parliament,) committing to them, respectively, a jurisdiction, *inter alia*, in personal actions in general, to which any member or servant of the university is a party; in every case at least where the cause of action arose within the liberties of the university, and such member or servant was resident in the university when it arose, and when the action was brought (*o*).

[These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence, it is apprehended, of a constitution of the Emperor Frederick, A.D. 1158 (*p*). But as to England in particular, the oldest charter that has been cited (*q*), containing this grant to the university of Oxford, was in the twenty-eighth year of Henry the third, A.D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which

12 East, 12; Thornton *v.* Ford, 15 East, 634; Perrin *v.* West, 3 Ad. & E. 405; R. *v.* Chancellor of Oxford, 1 Q. B. 952; Turner *v.* Bates, 10 Q. B. 292.

(*o*) Browne *v.* Renouard, 12 East, 42; Thornton *v.* Ford, 15 East, 634. This privilege, both as to Cambridge and Oxford, was, until recently, of an *exclusive* kind, the university being entitled, when an action under such circumstances was brought in any of the superior courts, to enter there a *claim of conusance*; by which it was withdrawn from that jurisdiction, and transferred to the court of the university. But as to Cambridge, this privilege is not now in every case exclusive; for by 19 & 20 Vict c. xvii, intituled "An Act to confirm an Award for the settlement "of matters in difference between "the University and Borough of "Cambridge, and for other purposes "connected therewith," it is provided by sect. xviii. that "the right "of the university, or any member "thereof, to claim conusance of any "action or criminal proceeding "wherein any person who is not a "member of the university shall be "a party, shall cease and determine."

(*p*) Cod. 4, tit. 13.

(*q*) Vide 3 Bl. Com. 84.

[was afterwards granted to Cambridge in the third year of Queen Elizabeth.] And later in the same reign [an act of parliament was obtained (r), confirming *all* the charters of the two universities, and those of the fourteenth year of Henry the eighth and the third year of Elizabeth, by name. Which *blessed act*, as Sir Edward Coke entitles it (s), established their privileges hereon without any doubt or opposition.]

By the effect of a recent enactment, however, the proceedings in the court at Oxford can no longer, (as formerly,) conform to the civil law; it being provided by 17 & 18 Vict. c. 81, s. 45, that for the future the court of the vice-chancellor of Oxford shall in all matters of law be governed by the common and statute law of the realm, and not by the rules of the civil law: that any three of the judges of the superior courts may make rules for its procedure; and that, subject to such rules, it shall proceed in conformity with the mode of procedure established in the county courts.

[We have now gone through the several species of special courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs (t);] a subject which

(r) 13 Eliz. c. 29.

(s) 4 Inst. 227.

(t) Among the courts of special jurisdiction was formerly that of the *great sessions in Wales*. For the ordinary writs for commencement of a suit, formerly did not run into Wales, and this principality had separate courts of its own;—it being provided by 34 & 35 Hen. 8, c. 26, and 18 Eliz. c. 8, that a session should be held twice a year in each county of Wales, by judges appointed by the crown, to be called the great session of the several counties in Wales. But the court of great sessions is now abolished by 11 Geo. 4 & 1 Will. 4, c. 70; and the Welsh judicature entirely incorporated with that of England. This alteration was founded on the First Report of the Common Law Commissioners appointed in 1828. As to the recording fines and recoveries levied and suffered in the court of great sessions in Wales, vide 5 & 6 Vict. c. 32.

Other courts of special jurisdiction also lately existed, viz., the *Court of the Marshalsea* and the *Palace Court* at Westminster; the former holding plea of all trespasses committed within the verge of the court, where one of the parties was of the royal household; and of all debts and contracts, where both were

may be closed by [one general observation from Sir Edward Coke; that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained; and cannot be extended further than the express letter of their privileges will most explicitly warrant (*u*).]

of that establishment: and the latter holding plea of all personal actions arising within twelve miles of the palace at Whitehall. (See 1 Bulst. 211; 10 Rep. 69; 2 Inst. 548; 1 Sid. 180; Salk. 439; 3 Bl. Com. 76). But these courts are both now abolished by 12 & 13 Vict. c. 101, s. 13.

Besides these, there are other courts, which, though not abolished, have fallen into disuse. These are the Court of *Piedpoudre* (*curia pedis pulverizati*), so called from the dusty feet of the suitors, which is a court of record incident to every fair and market, of which the steward of the owner of the market is the judge, with power to administer justice for all commercial injuries in that very fair or market, and not in any preceding one; (3 Bl. Com. pp. 33, 34; Bac. Ab. Court of Piepoudre; Com. Dig. Market, G. 1, 2): —the *Forest Courts*, for the government of the royal forests in different parts of the kingdom, and for the punishment of all injuries done to the *venison* or deer, to the *vert* or greensward,—and to the *covert* in which the deer are lodged (3 Bl. Com. p. 71; Com. Dig. Chase, R. 1, 2; Bac. Ab. Courts, Courts of the Forest; R. *v.* Comyns, 8 Q. B. 981):—and the *Court of Policies of Assurance*, a court established by 43 Eliz. c. 12, and 13 & 14 Car. 2, c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London. (3 Bl. Com. p. 75.) Causes of this kind are now always determined without the aid of any such commission, and by the verdict of a jury in the ordinary course of a suit at law.

(*u*) 2 Inst. 548.

CHAPTER VII.

OF CIVIL INJURIES COGNIZABLE IN THE COMMON LAW COURTS,—AND HEREIN OF THE REMEDY BY ACTION GENERALLY.

WE are now to proceed, in pursuance of the method laid down in the third chapter of this Book (*a*), to the examination of civil injuries—for the redress of which the great variety of courts mentioned in the preceding chapters have been established. And here, first, we may remark, that in one or other of these courts every possible injury that can exist in contemplation of our laws is capable of being redressed, it being a settled and invariable principle in the laws of England, that every wrong must have a remedy (*b*).

The nature of civil injuries, and the law connected with them, naturally fall under a division having reference to the courts in which they are thus redressed; and as these courts themselves are liable to be distinguished into three principal jurisdictions; as administrative of the common law,—of the laws ecclesiastical, military, and maritime (*c*),—or of equity; we shall find it convenient to consider civil injuries in the following order:—First, the injuries cognizable in the common law courts; secondly, those cognizable in

(*a*) Vide sup. p. 363.

(*b*) "It is a general and indisputable rule, that where there is "a legal right, there is also a legal "remedy, by suit or action at law, "whenever that right is invaded." (3 Bl. Com. 23.)

(*c*) In a certain sense the laws ecclesiastical, military and maritime are part of the common law of England (vide sup. vol. I. p. 69); but it is more usual and convenient to speak of them in a sense exclusive of the common law.

the ecclesiastical, military and maritime courts; and, lastly, those cognizable in the courts of equity;—in the examination of each of which, we shall also take occasion to notice in general, the nature of the remedies by suit, which the law has provided for them. But in this course of disquisition, we shall at present confine ourselves to [such wrongs as may be committed in the mutual intercourse between subject and subject; which the crown, as the fountain of justice, is officially bound to redress in the ordinary forms of law: reserving such injuries or encroachments as may occur between the crown and the subject, to be distinctly considered hereafter; as the remedy in such cases is generally of a peculiar and eccentrical nature.]

First, then, as to the several injuries between subject and subject, cognizable in the courts of common law.

[Since all wrong may be considered as merely a privation of right (*d*), the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by the specific delivery or restoration of the subject matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, &c.: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury (*e*), though such right be not fully ascertained till they are assessed by the intervention of the law;] that is, by the verdict of a jury. [The instruments whereby this remedy is obtained, (which are sometimes considered in the light of the remedy itself,)] are a diversity of *actions*, that is, suits at the common law, [which are defined by the Mirror (*f*) to be "the lawful demand of one's right," or as Bracton and Fleta

(*d*) Vide sup. vol. I. p. 136.

(*e*) Vide sup. vol. II. p. 11.

(*f*) Ch. 2, s. 1.

[express it, in the words of Justinian (*g*), *jus prosequendi in judicio quod alicui debetur*.

The Romans introduced pretty early, set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only. "*Actiones*," says the *Pandects*, "*compositæ sunt, quibus inter se homines disceptarent; quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt* (*h*)." The forms of these actions were originally preserved in the books of the Pontifical College as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people (*i*). The concealment was ridiculous;] but the establishment of some *formulæ* was undoubtedly useful, to define the cases in which the law considered a wrong to have been sustained, and to ascertain the nature of the remedy which it allowed, and thus to prevent the uncertainty that would otherwise have attended a subject of so much importance, as the right of action (*k*). [Or, as Cicero expresses it (*l*), "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur*."] With us in England, accordingly, the several actions have been from time immemorial conceived in fixed forms of complaint, each exclusively appropriate to the particular kind of injury for which redress is demanded (*m*).

(*g*) Inst. 4, 6.

(*h*) Ff. 1, 2, 2, s. 6.

(*i*) Cic. pro Muræna, s. 11; De Orat. l. i. c. 41.

(*k*) Blackstone (vol. iii. p. 118) says, "the establishment of some "standard was undoubtedly neces-"sary to fix the true state of a ques-"tion of right, lest in a long and "arbitrary process it might be shifted "continually, and be at length no "longer discernible."

(*l*) Pro Q. Roscio. s. 8.

(*m*) Vide Glanville, passim; Bract. lib. 5, De Exceptionibus, c. 17, s. 2. It is to be observed that the Common Law Procedure Acts, 1852 and 1854 (15 & 16 Vict. c. 76, and 17 &

Actions are subject, in the first place, to this principal division—that they are either *real, personal*, or *mixed* (*n*).

[Real actions, (or as they are called in the Mirror *feudal* actions,) which concern real property only,] are those whereby the plaintiff, here called the demandant, claims the specific recovery of any lands, tenements or hereditaments. [By these actions formerly all disputes concerning real estates were decided; but in modern times (*o*)] they have been pretty generally laid aside in practice, [upon account of the great nicety required in their management, and the inconvenient length of their process; a much more expeditious method of trying titles being since introduced by other actions,] and particularly by the species called ejectment, of which we shall have occasion presently to speak; and, subject to one or two exceptions, real actions are now at length, by the provisions of 3 & 4 Will. IV. c. 27, abolished.

Personal actions are those whereby a man either claims the specific recovery of a debt (*p*), or personal chattel (*q*), or [satisfaction in damages for some injury done to his person or property; being the same which the civil law calls "*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere* (*r*)."

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained.] But they partake, in the main, of the character of real actions, and

18 Vict. c. 125), though introducing the most extensive changes into the practice of the common law courts, yet contain no provision for abolishing the *forms of action;* which therefore remain as heretofore.

(*n*) Ch. 2, s. 6.

(*o*) Blackstone's expression is, that "they are now pretty generally "laid aside, &c." But this had been the case long before his time; see Co. Litt. by Harg. 239 a, note (1).

(*p*) As to *debt*, vide sup. vol. II. p. 140.

(*q*) As to personal chattels, vide sup. vol. II. p. 2.

(*r*) Inst. 4, 6, 15.

are often so called (s); and with the abolition of real actions, these also, with very few exceptions, have been swept away.

The real and mixed actions which have escaped the general demolition of their class, are the following: *writ of right of dower*, *dower*, and *quare impedit*; and to the same class seems to belong, in point of definition, though not in common parlance, or as to the nature of the procedure therein, the existing action of *ejectment* (t). The two first of these *lie* (in the language of the law), that is, are applicable, and are the proper forms to be used, where the demandant claims lands or tenements by the particular title of dower (u); the first being applicable where a woman is endowed of part of her dower, and is deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (x); and the second, in all other cases where she is entitled to dower (y):—*quare impedit* lies where the object is to recover the presentation to a benefice, the right to present to which is disturbed;—ejectment, where the object is to recover land improperly withheld, the case of land claimed in dower excepted. And as to the three first of these actions, it may be observed here, that by a peculiarity that has always attached to the class of real and mixed

(s) Co. Litt. 285 b; Roscoe, Real Actions, 1.

(t) Ejectment, prior to the statute 15 & 16 Vict. c. 76, (by which its form has been now remodelled), was often considered as a *mixed* action (see 3 Bl. Com. 214), and was expressly so denominated in the stat. 3 & 4 Will. 4, c. 27. The correctness, however, of that arrangement was doubtful, for in its form it was clearly a species of the personal action of trespass. (See Fitz. Ab. tit. Ejectione Firmæ, 2.) Under the new act of 15 & 16 Vict. c. 76, above referred to, it is difficult to fix its technical character. It seems to fall under the definition of a real action, because it claims the specific recovery of land without damages. But in its incidents it has no connection whatever with the antiquated remedies to which that appellation commonly belongs.

(u) As to dower, vide sup. vol. I. p. 270.

(x) Roscoe on Real Actions, 29.

(y) Ibid. 30.

or imprisonment—or at least implied force, as in the case of an unlawful but peaceable entry upon the plaintiff's land. And here it may be observed, that [trespasses savour of the criminal kind—being always attended with some violation of the peace,] real or supposed, [for which in strictness of law a fine ought to be paid to the crown, as well as a private satisfaction to the party injured (*d*). Trespass on the case is a form of action less antient than the rest, having apparently first come into use in the reign of Edward the third (*e*). It was invented under the authority of the Statute of Westminster, 13 Edw. I. c. 24 (*f*), upon the analogy of the old form of trespass, and supplied a great defect in the original scheme of personal actions—a scheme devised in comparatively barbarous times, and comprising no forms adapted to the redress of many of those injuries which in the progress of society gradually attract notice. This kind of action—which derives its name from the comparative particularity with which the circumstances of the plaintiff's case are detailed in its written allegations (*g*)—is very comprehensive in its scope, and may be said to lie in every case where damages are claimed for an injury to person or property, not falling within the compass of the other forms. And as regards its relation to trespass, we may notice this [settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass—but where there is no act done, but

(*d*) Finch, L. 198; Jenk. Cent. 158.

(*e*) Reeves's Hist. of Eng. L. vol. 3, p. 89; et vide ibid. pp. 243, 391.

(*f*) This statute provided, that "whensoever from thenceforth in "one case a writ shall be found in "the chancery, and in a like case, "falling under the same right, and "requiring like remedy, no prece-"dent of a writ can be produced, "the clerks in chancery shall agree "in forming a new one; and if they "cannot agree, it shall be adjourned "to the next parliament, where a "writ shall be framed by consent of "the learned in the law; lest it hap-"pen for the future, that the court "of our lord the king be deficient "in doing justice to the suitors."

(*g*) 3 Bl. Com. 122.

actions, they can be brought in none of the superior courts of common law, except the Court of Common Pleas. But ejectment may be brought in any of them.

Personal actions are founded either on *contracts* or on *torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract;—and these torts are often considered as of three kinds, viz., *nonfeazance*, or the omission of some act which a man is bound to do; *misfeasance*, being the improper performance of some act which he may lawfully do; or *malfeazance*, being the commission of some act which is unlawful (z). Actions founded on contract, are sometimes described as actions *ex contractu*; and those on tort, as actions *ex delicto*.

The forms of personal action in use, are the following: *debt*, *covenant*, *detinue*, *trespass*, *trespass on the case* (a), and *replevin*; the two first being founded generally on contract, the remainder generally on tort. Of these in their order.

Debt lies where the object is the recovery of a debt, that is, a certain sum of money alleged to be due to the plaintiff; covenant, where redress in damages is sought for the breach of a covenant, that is, of an agreement by *deed* (b); detinue, where the object is to recover a chattel personal unlawfully detained. Trespass lies where the plaintiff claims damages for a trespass, or (as it is more fully expressed), a trespass *vi et armis* (c), that is, an injury accompanied with actual force, as in the case of a battery

(z) 1 Chit. Pl. 134, 1st edit.

(a) The form of *trespass on the case* properly and technically includes, among other species, the action of *assumpsit*,—and the text adheres to this technical view,—but the action last mentioned, being the ordinary remedy for a breach of promise, is usually considered in practice as founded on contract, and ranked as a distinct form, in addition to the six noticed in the text.

(b) As to deeds, vide sup. vol. I. p. 481.

(c) In actions of trespass the formal words *vi et armis* and *contra pacem*, were formerly always used in the pleadings. But by 15 & 16 Vict. c. 76, s. 49, they were directed to be omitted for the future.

[only a culpable omission, or where the act is not *immediately* injurious, but only by *consequence* or collaterally, there no action of trespass will lie, but an action on the case for the damages consequent on such omission or act (*h*).] To which we may add, that where the subject matter affected is not corporeal and tangible, so that the idea of force becomes inapplicable, there though the injury be by way of act done, and its operation be direct and immediate, yet the remedy is case and not trespass (*i*). Lastly, with respect to replevin, it will be sufficient for the present to remark, that it is an action of very limited application, and in practice confined to the object of trying the legality of a distress levied upon the plaintiff's personal chattels (*j*).

A fitter opportunity will be found in the next chapter, of entering more at large into the nature and the competency, in different cases, of the different actions above enumerated, and also of referring to the particular *species* which some of them comprise—but there are some points besides those hitherto mentioned, which, as relating to actions in general, seem to require notice in this place.

Actions are either *local* or *transitory;* the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land (*k*); the latter on such causes of action as may be

(*h*) Scott *v.* Shepherd, 2 Bl. Rep. 892; see Gilbertson *v.* Richardson, 5 C. B. 502.

(*i*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, (A. 2).

(*j*) It will lie in other cases also of goods unlawfully taken. (See Co. Litt. 145 b; Vin. Ab. Replevin (B.); Com. Dig. Action (M. 6); George *v.* Chambers, 11 Mee. & W. 149; Morrell *v.* Martin, 3 Man. & Gr. 581; Mellor *v.* Leather, 1 Ell. & Bl. 619. But it will not lie where the goods were delivered to the party who took them and retained by him. (Galloway *v.* Bird, 4 Bing. 300; Mennie *v.* Blake, 25 L. J., Q. B. 399.) See further as to the proceedings in replevin, bk. v. c. xi.

(*k*) Another instance of a local action is one brought upon a matter of *record* in any of the courts at Westminster; and therefore formerly an action of *scire facias* to repeal letters patent was local. But now by 12 & 13 Vict. c. 109, s. 29, any writ of *scire facias*, in an action at

supposed to take place anywhere—as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local; personal are for the most part transitory. Between local and transitory actions, there is this important distinction—that the former are, as the general rule, tried in the proper county where the cause of action arose, and by a jury of that county (*l*); the latter may be tried in any county, at the discretion (in general) of the plaintiff. It follows from this, that when an injury is committed out of England, and its nature is such as to make the action local, no action at all will lie for its redress, in any English court. On the other hand, where the nature of the injury is such that the action is transitory, such action will lie in the English courts, whether the injury was committed in England or elsewhere. In order to justify indeed the institution even of a transitory suit in the English courts when the cause of action arises abroad, it was once necessary to have recourse to a legal fiction, and to allege on the face of the proceedings, that the cause of action arose (contrary to the truth of the fact) in an English county. But no recourse to this fiction is had in the present system of pleading (*m*).

Personal actions are also subject, (as sufficiently appears by preceding explanations,) to the distinction of being either brought for the specific recovery of property, or for damages. As regards the competency of the latter kind of remedy, it is to be remarked, that an action for damages will in general lie wherever a right has been in-

suit of her Majesty for repealing letters patent, may be directed to the sheriff of any county, though the record on which it is founded may remain in Middlesex or any other county.

(*l*) By 3 & 4 Will. 4, c. 42, s. 22, power is given to a judge to order the trial in a local action to be had elsewhere, if it be shown to his satisfaction that such course will be more convenient.

(*m*) The plaintiff, however, in his declaration or statement setting forth his cause of action, always specifies in the margin some English county, as that in which he proposes that the cause should be tried. (See 15 & 16 Vict. c. 76, s. 59.)

vaded—or, in other words, an injury committed,—although no damage should have been actually sustained; it being material to the establishment and preservation of the right itself, that its invasion should not pass with impunity (*n*). Thus an action of trespass on the case, by one commoner against another, for surcharging the common, (that is, turning on more cattle than he was entitled to do,) may be maintained, although the plaintiff may not himself have turned on any cattle of his own during the same year, and can therefore have sustained no actual loss (*o*). In such cases, there being no ground for awarding damages to any considerable amount, the plaintiff recovers some trifling sum by way of *nominal* damages;—in addition to which, the defendant has in general to sustain the costs of the action, including those incurred by his adversary (*p*).

It is however requisite, in order to sustain an action for damages, that the plaintiff should have sustained some loss or inconvenience, whether actual or nominal, of a kind proper and peculiar to himself;—for where the damage is of a merely public character, affecting the subjects of the realm at large as well as the plaintiff, no civil action lies, although the law considers the injury, in that case, as amounting to a crime, and consequently as a fit subject for an indictment. Thus no action can be maintained for an encroachment on the highway; but the offender is liable to be indicted as for a public misdemeanor. Wherever extraordinary damage, indeed, is sustained by an individual, he has in general a right of action as for redress of a civil injury, though the case may in its circumstances also amount to a crime. Thus, in the case last supposed, [if by means of a ditch dug across a public way, which is a

(*n*) 1 Saund. by Wms. 346 b.

(*o*) Wells *v.* Watling, 2 Bl. Rep. 1233; et vide Marzetti *v.* Williams, 1 B. & Adol. 426; Blofeld *v.* Payne, 4 B. & Adol. 410.

(*p*) Where the action however is really not brought to try a right, and the damages, as recovered by verdict, are under a certain amount, the plaintiff will, in general, not recover his costs. (3 & 4 Vict. c. 24.)

[common nuisance, a man or his horse suffer any injury by falling therein, then for this particular damage, which is not common to others, the party shall have his action (*q*).] And so in the case of unlawful violence designedly done to the person, though that always amounts, in contemplation of law, to a crime, and, under particular circumstances, even to a felony, yet the party injured is entitled to his civil remedy. But even here this distinction is to be observed, that in the case of a felony, the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime (*r*); though for a mere misdemeanor, such as assaults, batteries, libels, and the like, the right of action is subject to no such impediment.

Moreover, though an action will lie, (as we have seen,) for an injury, unattended with actual loss or damage, yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury; it being a maxim, that a mere *damnum absque injuria* is not actionable. Thus, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him, for every one may lawfully erect a mill on his own ground. But if I have a mill by prescription on my own land (*s*), and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action will lie against him of trespass on the case (*t*).

It may also be remarked, that a plaintiff is not entitled to recover in respect of any damage that is too *remote*; or, in other words, flows not naturally and directly from the alleged injury (*u*). Thus, where the plaintiff, being director

(*q*) 3 Bl. Com. 220. See Wilks *v.* Hungerford Market, 2 Bing. N. C. 281.

(*r*) See Crosby *v.* Leng, 12 East, 409; 7 & 8 Geo. 4, c. 29, s. 57; White *v.* Spettigue, 13 Mee. & W. 603. Vide post, bk. VI. c. I.

(*s*) Vide sup. vol. I. p. 683.

(*t*) Bac. Ab. Actions on the Case, (C), and the authorities there cited.

(*u*) Com. Dig. Action on Case, Defamation.

of certain musical performances, brought an action on the case against the defendant, for publishing a libel on a public singer engaged by the plaintiff, alleging that she was thereby deterred from performing in public, through the apprehension of being ill received, so that the plaintiff lost the profits which would otherwise have accrued to him as such director,—it was held that the damage was too remote, and the action not maintainable (*x*).

As to suits of every class, it is generally true that the right of action is not assignable, so as to enable the assignee to sue in his own name. But in certain cases it is transferred by the operation of law. Thus the rights of action of a bankrupt, or an insolvent, pass (with certain exceptions) to their assignees; and upon the death of either of the parties between whom a cause of action has arisen, the right of maintaining such action survives, in general, to or against his executors or administrators; and to these, as well as to the assignees of a bankrupt or insolvent, the right also belongs of *continuing* actions, which the deceased, the bankrupt, or insolvent, has commenced (*y*). But in respect to suits which are founded on certain violations of personal rights (*z*), as, in the case, for example, of an action for slander, the maxim is, that they *die with the person* (*a*). And by the common law, this extended to every case of *tort* (*b*). But as relates to torts in general, the rule has been set aside by various acts of parliament. For by 4 Edw. III. c. 7, trespass may be maintained *by* executors or administrators, for trespasses to the goods of the testator or intestate. And again, by 3 & 4 Will. IV. c. 42, s. 2, it is provided, that trespass,

(*x*) Ashley *v.* Harrison, 1 Esp. 48; et vide Kelly *v.* Partington, 5 B. & Adol. 645; Knight *v.* Gibbs, 1 Ad. & El. 43; Green *v.* Button, 1 Tyr. & G. 118; Langridge *v.* Levy, 2 Mee. & W. 519; S. C. in error, 4 Mee. & W. 337; 2 Smith's Leading Cases, 304.

(*y*) 15 & 16 Vict. c. 76, ss. 137, 138; and see 17 & 18 Vict. c. 125, s. 92.

(*z*) As to personal rights, vide sup. vol. I. p. 136.

(*a*) 3 Bl. Com. 302.

(*b*) 1 Chit. Pl. 56. As to *torts*, vide sup. p. 449.

or trespass on the case, (according to circumstances,) may be maintained *by* executors or administrators, for any injury to the real estate of the deceased committed in his lifetime, provided it were committed within six calendar months before his death, and the action brought within one year after his death. And further, that the same forms of action may be maintained *against* executors or administrators, for any wrong committed by the deceased against another, in respect of his property real or personal, provided it have been committed within six calendar months before his death, and the action be brought within six calendar months after the executors or administrators have taken on themselves the administration. And, lastly, by 9 & 10 Vict. c. 93 (*c*), it is enacted, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would, (if death had not ensued,) have entitled the party injured to maintain an action for damages, the person who would have been liable to such action may be sued by the executor or administrator, for the benefit of the wife, husband, parent and child of the person deceased; and this, although the death shall have been caused under such circumstances as amount in law to felony; and the jury may give damages proportionable to the injury resulting from such death, to be divided among the parties respectively, for whose benefit the action is brought, in such shares as the jury shall by their verdict direct.

Before we conclude this chapter, it is proper to remark, that besides the *remedy* for wrong sustained, which is found, as already stated, in the action itself, the common law courts will now afford collateral protection against the *continuance* or *repetition* of the wrong; every person who

(*c*) As to this statute, see Hutchinson *v.* York, Newcastle and Berwick Ra. Co., 5 Exch. 343; Wigmore *v.* Jay, ibid. 354; Reedie *v.* London and North-Western Ra. Co., 20 L. J. (Ex.) 65; Blake *v.* Midland Ra. Co., 21 L. J. (Q. B.) 233; Wiggett *v.* Fox, 11 Exch. 832; Tucker *v.* Chaplin, 2 Car. & Kir. 730; Barnes *v.* Ward, 9 C. B. 392.

brings an action for breach of contract or other injury, being by the Common Law Procedure Act, 1854, entitled in such action also to claim a *writ of injunction* against the continuance or repetition of such breach of contract, or other injury,—or the committal of any breach of contract, or other injury of a like kind arising out of the same contract, or relating to the same property or right (*d*). This is a protection which the common law courts had previously no jurisdiction to grant. It could be obtained only from a court of equity.

(*d*) 17 & 18 Vict. c. 125, s. 89, *et seq.*

CHAPTER VIII.

OF CIVIL INJURIES COGNIZABLE IN THE COMMON LAW COURTS—*continued.*

Having in the course of the last chapter entered into some general explanations with regard to the nature of the great common law remedy, by *action*, (a subject to which we shall have occasion to revert,) we now resume our inquiry into the civil injuries cognizable in the courts of the common law, to the right apprehension of which we have deemed some preliminary acquaintance with the scheme of actions essential.

The rights which are severally due to the different members of the community, and the establishment and maintenance of which, we have considered as the great objects of municipal law,—were divided, (as we may remember,) into personal rights, rights of property, rights in private relations, and public rights (*a*). It will be convenient, therefore, in proceeding to a further investigation of the civil injuries cognizable in the courts of common law, to subject these injuries, (which are but the violations of so many rights,) to a similar distribution.

I. First, then, as to such injuries as affect *personal* rights, viz. the right of personal security, (comprising those of life, limbs, body, health and reputation,) and the right of personal liberty (*b*).

1st. Of injuries which affect the life of man, it is sufficient to remark, that they are not merely civil wrongs,

(*a*) Vide sup. vol. I. p. 138. (*b*) Vide sup. vol. I. p. 145.

but, (where committed with intenti[illegible]amount to [one of the most atrocious species of crimes.] These therefore shall for the present be passed by, and [reserved] for the next Book of these Commentaries (*c*), viz. that which relates to the criminal law.

2, 3. The two next species of injuries, affecting the limbs or bodies of individuals, shall be considered in one and the same view. And these may be committed, 1. By *threats* (or menaces of bodily hurt), through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury: but to complete the wrong, there must be both of them together.] 2. [By *assault;* which is an attempt or offer to beat another without touching him (*d*): as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him, but misses him, this is an assault, *insultus,* which Finch (*e*) describes to be "an unlawful setting upon one's person."] 3. [By *battery;* which is the beating of another. The least touching of another's person, wilfully or in anger, is a battery (*f*): for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it,—every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. And therefore, upon a similar principle, the Cornelian law, *De injuriis,* prohibited *pulsation* as well as *verberation,*—distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none (*g*).] Injuries to limbs and body may also be, 4. [By *wounding;* which consists in giving another some dangerous hurt, and is

(*c*) They are capable, however, under the statute 9 & 10 Vict. c. 98, mentioned in a former place, of being considered merely as civil wrongs, vide sup. p. 456.

(*d*) See Reed *v.* Coker, 13 C. B. 850.

(*e*) Finch, L. 202.

(*f*) See Pursell *v.* Horn, 8 Nev. & P. 564; Stephens *v.* Myers, 4 Car. & P. 349; Forde *v.* Skinner, ibid. 239; James *v.* Campbell, 5 Car. & P. 372; Moriarty *v.* Brooks, 6 Car. & P. 684; Blake *v.* Barnard, 9 Car. & P. 626.

(*g*) Ff. 47, 10, 5.

[only an aggravated species of battery.] 5. [By *mayhem*; which is an injury still more atrocious. It consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he might otherwise have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth (*h*), and also some others (*i*). But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. For each of these five injuries,—threats (*k*), assault, battery, wounding and mayhem,—an action of trespass will lie, wherein the jury will give adequate damages (*l*).] And for the four last, at least, [an indictment may be brought as well as an action (*m*).] It is to be observed, however, as to all these acts, that, to render them either actionable or indictable, they must be committed on an unlawful occasion: for they are all in some cases justifiable, and form no just ground of complaint either civil or criminal. Thus assault and battery are justifiable [where one who

(*h*) Finch, L. 204.

(*i*) 1 Hawk. P. C. 111.

(*k*) The doctrine that trespass is the proper form of action for a *threat*, attended with injurious consequences, has been questioned. But see Finch, L. 202; 2 Rol. Ab. 545; Com. Dig. Battery (D.), in accordance with Blackstone on this subject.

(*l*) With respect to the action for *mayhem*, it is said to be attended with this peculiarity, that the court in which the action is brought has a discretionary power to increase the damages if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof that it is the same wound concerning which evidence was given to the jury. Christian's Black. vol. iii. p. 121, (n.), cites Brown *v.* Seymour, 1 Wils. 5; 1 Barnes, 106.

(*m*) Every *battery*, *wounding*, or *mayhem*, implies an *assault*; and the term *assault* is often used to express all these injuries. All assaults, whether including battery, &c., or not, are indictable: and many provisions of the criminal law are specially directed to the case of aggravated assaults: which, in many cases, are punishable by imprisonment, with hard labour. (See 14 & 15 Vict. c. 11; c. 19, s. 4; c. 100, s. 29.)

[has authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice]. So also on the principle of self-defence, for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it, may plead *son assault demesne* (o), or that it was the plaintiff's own original assault that occasioned it;] and supposing a dangerous scuffle thereon to take place, I may even, for my own preservation (but not otherwise), wound or maim my adversary, and justify it under a similar plea (p). [So likewise in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (q). Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation (r); and if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose.] 6. The limbs and bodies of individuals may also be affected by indirect or consequential, as well as immediate injury,—particularly by *negligence* in the performance of duties: as in the case where a passenger in a coach is overturned by the carelessness of the driver (s). The remedy for this sort of injury is an action of trespass on the case (t); which may be brought not only where the coach proprietor is guilty of the negligence in his own person, but also where the fault was that of his servant; it being a general principle

(n) Hawk. P.C. bk. i. c. 61, s. 23; Winstone v. Linn, 1 B. & C. 469.

(o) Oakes v. Wood, 3 Mee. & W. 150.

(p) Cockcroft v. Smith, 2 Salk. 642.

(q) Finch, L. 203.

(r) Vide sup. p. 42.

(s) Brotherton v. Woodrod, 3 B. & Bing. 54; Randleson v. Murray, 8 Ad. & El. 109; Lynch v. Nurdin, 1 Q. B. 29. So in the case where a passenger by railway is injured by the negligence of the company or its servants, vide sup. p. 278.

(t) See Gordon v. Rolt, 4 Exch. 365; Sharrod v. London and North-Western Ra. Co., ibid. 580.

applicable not only to torts of this description, but to all other torts, and indeed to trespasses also,—that a man is civilly liable not only for what he does in his own person, but for what he does in the person of another, acting at the time by his authority: for "*qui facit per alium, facit per se.*" Another consequential injury to the bodies of individuals, falling under the same head, is that of damage done to the person, by a dog or other brute animal, used to do mischief; in which case [the owner must answer for the consequences, if he knows of such evil habit,] unless the dog were carefully kept for the protection of the house and yard, and the attack was owing to the plaintiff's having improperly or incautiously entered the premises by night (*u*).

4. [Injuries affecting a man's health are, where by any unwholesome practices of another, a man sustains any damage in his vigour or constitution. As by selling him bad provisions or wine (*x*); by the exercise of a noisome trade, which infects the air in his neighbourhood (*y*);] or by the neglect or unskilful management of the surgeon, or apothecary, who attends him (*z*). [For it hath been solemnly resolved (*a*) that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law (*b*), neglect or want of skill in physicians or surgeons "*culpæ*

(*u*) See the following cases, which have arisen out of injuries of this description:—Blyth *v.* Topham, Cro. Jac. 158; Brock *v.* Copeland, 1 Esp. 203; Bird *v.* Holbrook, 4 Bing. 642; Hartley *v.* Harriman, 1 B. & Ald. 620; Thomas *v.* Morgan, 5 Tyr. 1085; May *v.* Burdett, 9 Q. B. 101; Card *v.* Case, 5 C. B. 622; Hudson *v.* Roberts, 6 Exch. 697; Jackson *v.* Smithson, 15 Mee. & W. 563.

(*x*) 1 Rol. Abr. 90; R. *v.* Southerton, 6 East, 133.

(*y*) 9 Rep. 58; Hutt, 135; R. *v.* Dewsnap, 16 East, 194.

(*z*) See Dr. Groenvelt's case, 1 Ld. Raym. 214; Seare *v.* Prentice, 8 East, 348; Slater *v.* Baker, 2 Wils. 359; Hancke *v.* Hooper, 7 Car. & P. 81; Lanphier *v.* Phipos, 8 Car. & P. 475.

(*a*) Ld. Raym. ubi sup.

(*b*) Inst. 4, 3, 6, 7.

[*adnumerantur, veluti si medicus curationem dereliquerit male quempiam secuerit, aut perperam ei medicamentum dederit*:" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by an action of trespass on the case;] and in case of gross misconduct the party may in some cases also be indicted (*c*).

5. [Injuries affecting a man's reputation or good name] are, first, by malicious and defamatory words. And as to this injury (the remedy for which is also by trespass on the case), we may in the first place remark, that though malice is a necessary ingredient, yet where words are in a legal sense defamatory, and it does not appear that they were spoken on any such lawful occasion as to rebut the supposition of malice, the law will always conclude them to be malicious (*d*). The cases in which words will be considered defamatory, so as to amount to the legal injury of which we now speak, are as follows: viz. where a man utters anything of another [which may either endanger him in law, by impeaching him of some] punishable (*e*) [crime,—as to say that he hath poisoned another, or is perjured (*f*); or which may exclude him from society,—as to charge him with having an infectious disorder,] tending so to exclude him (*g*); [or which may impair or hurt his trade or livelihood (*h*),—as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave;] or which may disparage him in an office of public trust,—as

(*c*) R. *v.* Long, 4 Car. & P. 398; ibid. 407, n. (*a*).

(*d*) See Bromage *v.* Prosser, 4 B. & C. 247; Haire *v.* Wilson, 9 B. & C. 643; Pearson *v.* Lemaitre, 5 Man. & G. 700; Babonneau *v.* Farrell, 15 C. B. 360; 15 & 16 Vict. c. 76, s. 61.

(*e*) See Holt *v.* Scholefield, 6 T. R. 691; Rowcliffe *v.* Edmonds, 7 M. & W. 12; Heming *v.* Power, 10 Mee. & W. 564.

(*f*) Finch's Law, 185.

(*g*) Such as leprosy, &c.; Com. Dig. Act. Def. (D. 28). See Bloodworth *v.* Gray, 7 Man. & G. 334.

(*h*) See Jones *v.* Littler, 7 Mee. & W. 423; Bellamy *v.* Burch, 16 Mee. & W. 590; Southee *v.* Denny, 1 Exch. 196; Evans *v.* Harries, 1 H. & N. 251; Brown *v.* Smith, 13 C. B. 596.

[to say of a magistrate that he is partial and corrupt (*i*). But scandalous words which concern matters merely spiritual, as to call a man heretic or adulterer, are not cognizable by a common law court (*k*).] And the case is the same as to words imputing unchastity to a woman; except that, by the custom of London, an action may be maintained for that species of slander, in the city courts (*l*). [Words spoken in derogation of a peer or judge, or other great officer of the realm, which are called *scandalum magnatum*,] are held to be particularly heinous (*m*); [and though they may be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, which is redressed by an action on the case, founded on many antient statutes (*n*); as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained.] But no resort to this action having been made in modern times, it is now in a manner forgotten. [It is said that formerly no actions were brought for words, unless the slander were such as, if true, would endanger the life of the object of it (*o*). But too great encouragement being given by this lenity to false and malicious slanderers, it is now held, that for scandalous words of the several species before mentioned, (that may endanger a man by subjecting him to the penalties of the

(*i*) Com. Dig. ubi sup.; 2 Cro. 90. See Ashton *v.* Blagrave, Ld. Raym. 1369.

(*k*) Parret *v.* Carpenter, Noy, 64. But such words, or words imputing unchastity to a woman, will be cognisable there, if *special damage* has followed, vide post, p. 465. Formerly they were cognisable *per se* in the ecclesiastical courts; but suits for defamation in those courts are now abolished by 18 & 19 Vict. c. 41.

(*l*) Com. Dig. ubi sup. (F. 20); Pulling's Laws of London, 186, and see the authorities there cited. As to a similar custom in the city of Bristol, vide Power *v.* Shaw, 1 Wils. 62.

(*m*) Earl of Peterborough *v.* Sir J. Mordant, 1 Vent. 60.

(*n*) Westm. 1, 3 Edw. 1, c. 34; 2 Rich. 2, st. 2, c. 5; 12 Rich. 2, c. 11.

(*o*) King *v.* Sir E. Lake, 2 Vent. 28.

[law, may exclude him from society, may impair his trade, or may disparage one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod* (*p*).] As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not actionable unless there be special damage; but if I say this to a person who was going to deal with him, and he forbear to do so in consequence of its being said, an action will lie against me (*q*). So if I impute heresy or adultery to another, (which are matters merely spiritual,) yet if he can show that he was thereby exposed to temporal damage, he may sue me in a court of common law (*r*); and the case is the same if I impute unchastity to a woman, and she can show that she has thereby lost a marriage (*s*). And [in like manner to slander another man's *title*, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable,] provided it be not done in the *bonâ fide* assertion of the defendant's own title, and [provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land (*t*).] It

(*p*) See Hopwood *v.* Thorn, 8 C. B. 293.

(*q*) Storey *v.* Challands, 8 Car. & P. 234.

(*r*) 3 Bl. Com. 125. See Carslake *v.* Mapledoram, 2 T. R. 473; Bois *v.* Bois, 1 Lev. 134; Stephens *v.* Corben, 3 Lev. 395; Pemberton *v.* Colls, 10 Q. B. 461; Gallway *v.* Marshall, 9 Exch. 294.

(*s*) Com. Dig. ubi sup. (D. 30); Wilby *v.* Elston, 8 C. B. 142.

(*t*) As to slander of title, vide Smith *v.* Spooner, 3 Taunt. 246; Robertson *v.* M'Dougall, 4 Bing. 670; Malachy *v.* Soper, 3 Bing. N. C. 371; Pitt *v.* Donovan, 1 M. & S. 639; Pater *v.* Baker, 3 C. B. 831; Brook *v.* Raul, 4 Exch. 521.

is, however, to be understood, that even where special damage has thus been sustained in consequence of words spoken with respect to person or property, yet if the words are not disparaging in themselves, it is *damnum absque injuriâ*, and no action can be maintained upon them (*u*). So even where the words are disparaging, and attended with special damage, or of such a kind as even without special damage will sustain an action, yet if they be [spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will,] they are not actionable, [for in such case they are not *maliciously* spoken (*x*),]—which is part of the definition of the injury in question. And on the same principle, are protected all such statements as it is usual to comprehend under the name of *privileged* communications (*y*),—viz. those which are made on such lawful occasions as tend to rebut the *primâ facie* inference of malice, which otherwise arises from a statement derogatory to private character; as where a man communicates to another, circumstances which it is right that he should know in relation to a matter in which they have a mutual interest, but tending to the disparagement of a third person; or where a master, being called upon for the

(*u*) Kelly *v.* Partington, 5 B. & Ad. 645.

(*x*) See Pater *v.* Baker, 3 C. B. 831.

(*y*) As to friendly or privileged communications, see Wetherston *v.* Hawkins, 1 T. R. 110; Rogers *v.* Clifton, 3 Bos. & Pul. 594; Knight *v.* Gibbs, 1 A. & E. 43; Martin *v.* Strong, 5 A. & E. 535; Padmore *v.* Lawrence, 11 A. & E. 380; Tusan *v.* Evans, 12 A. & E. 733; Wright *v.* Woodgate, 1 Tyr. & G. 12; Fountain *v.* Boodle, 3 Q. B. 5; Griffiths *v.* Lewis, 7 Q. B. 61; Blagg *v.* Sturt, 10 Q. B. 899; Simpson *v.* Robinson, 12 Q. B. 743; Taylor *v.* Hawkins, 20 L. J. (Q. B.) 313; Coxhead *v.* Richards, 2 C. B. 569; Blackham *v.* Pugh, ibid. 611; Bennett *v.* Deacon, ibid. 628; Hopwood *v.* Thorn, 8 C. B. 293; Somerville *v.* Hawkins, 10 C. B. 583; Kershaw *v.* Bailey, 1 Exch. 743; Taylor *v.* Hawkins, 16 Q. B. 308; Gilpin *v.* Fowler, 9 Exch. 615; Harris *v.* Thompson, 13 C. B. 333; Manby *v.* Witt, 18 C. B. 544. As to the expression of opinion of the public acts of official persons, vide Gathercole *v.* Miall, 15 Mee. & W. 319. As to the report of a trial, Hoare *v.* Silverlock, 9 C. B. 20. As to the report of a public meeting, Davidson *v.* Duncan, 26 L. J. (Q. B.) 104.

character of a servant who has left him, charges him with a theft. For in such cases as these no action lies, unless some proof of malice beyond the uttering of the words be given, as that the defendant knew them to be false (z). Also, if the defendant be able to prove the words to be *true*, no action will lie for any words of defamation whatever, whether they were spoken on a privileged occasion or not, and whether special damage has ensued or not; for the law then deems them to be justifiable. [As if I can prove the tradesman a bankrupt, the physician a quack, and the lawyer a knave, this will destroy their respective actions;] a rule similar to that which prevailed in the civil law, and probably founded on the same policy: "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit*" (a).

A second way of affecting a man's reputation is by publishing (b) a *libel* upon him; which, as regards the present purpose (c), may be defined to be some writing, picture, or the like, containing malicious and defamatory matter. The nature of this injury and the remedy, are in general similar to what has been already laid down in the case of words spoken,—but subject to some material differences. For not only such imputations as will support an action for words, but all contumelious matter that tends to degrade a man in

(z) In Lord Northampton's case, 12 Rep. 134, it is laid down that where the words spoken by the defendant are a mere repetition of what he has himself heard from another, and he names his author at the time, he is not liable to an action. But see Lewis v. Walker, 4 B. & Ald. 614; M'Pherson v. Daniels, 10 B. & C. 269; De Crespigny v. Wellesley, 5 Bing. 392. See also Davidson v. Duncan, 26 L. J. (Q. B.) 104. It seems that no action for damages will lie against a witness in a court of justice for speaking falsely and maliciously. The only remedy is to indict him for perjury, or to sue him for the penalty given in such cases by 5 Eliz. c. 9. See Revis v. Smith, 18 C. B. 126.

(a) Ff. 47, 10, 18.

(b) As to what amounts to publication, see Tidman v. Ainslie, 10 Exch. 63.

(c) Besides defamatory libels, there are those of a blasphemous, seditious, or immoral kind: as to which vide post, bk. VI. c. VII.; c. X.

the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, or by picture, or the like, to libel (*d*). Again, while oral defamation is ground for an action only, there are, in the case of publishing a libel, [two remedies—one by indictment, and the other by action; the former for the *public* offence, (for every libel has a tendency to the breach of the peace by provoking the person libelled to break it,)] and the latter to repair the *party* in damages, for the injury done by him. And formerly the rule was, that on an indictment for publishing a libel, the defendant was not allowed to allege the truth of it by way of justification (*e*); for even if true, it tended nevertheless to a breach of the peace. But in the action for damages, the defendant might, (in like manner as for words *spoken*,) adopt that line of defence (*f*). And on this latter point the law is still the same; but on the former it is now materially altered by the late act 6 & 7 Vict. c. 96 (*g*), for amending the law respecting defamatory words and libel. By this Act it is provided, that in pleading to any indictment or information for defamatory libel, the defendant may, by way of defence, allege the truth of the matters charged; and further, that it was for the public benefit that the matters charged should be published,—showing the particular fact or facts by reason whereof it was for the public benefit: and that if after such plea the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by

(*d*) See Thorley *v.* Lord Kerry, 4 Taunt. 355; Cook *v.* Ward, 6 Bing. 409; Lord Churchill *v.* Hunt, 2 B. & Ald. 685; Hearne *v.* Stowell, 12 A. & E. 719; Cheese *v.* Scales, 10 Mee. & W. 488; Capel *v.* Jones, 4 C. B. 259. The proper course at the trial of an action for libel is, for the judge to define to the jury what a libel is in point of law, and then to leave it to the jury to say whether the publication in question falls within that definition. Parmiter *v.* Coupland, 6 Mee. & W. 105. By Mr. Fox's Act, 32 Geo. 3, c. 60, the law is settled the same way in criminal prosecutions for libel.

(*e*) 5 Rep. 125.

(*f*) Lake *v.* Hatton, Hob. 253; 11 Mod. 99.

(*g*) Amended by 8 & 9 Vict. c. 75.

the plea and the evidence thereon (*h*). The Act also contains provisions intended to relieve editors and proprietors of newspapers or other periodical publications from the hardship to which they were subject under the former law; it having held them liable, absolutely and without qualification, for all libels therein inserted, though inserted without their knowledge. These provisions are, that in an action for a libel of this description, it shall be competent to the defendant to plead that it was inserted without actual malice (*i*), and without gross negligence; and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the same publication a full apology; (or, if the publication should be ordinarily published at intervals exceeding a week, had offered to publish the apology in any newspaper or periodical publication to be selected by the plaintiff):—it being also provided, however, that to render such plea effectual, the defendant shall, at the same time, pay into court a sum of money by way of amends for the injury sustained (*k*): and it is also provided, as regards an indictment or information for *any* libel, (where evidence shall have been given establishing a presumptive case of publication against the defendant, by the act of another person by his authority,) that it shall be competent to the defendant to prove that the publication was without his authority, consent or knowledge; and did not arise from want of due care and caution on his part. The statute further enacts, that in all indictments or informations by a private prosecutor, for a *defamatory* libel, if judgment be given for the defendant, he shall be entitled to costs from the prosecutor; and if it be given against him, upon a special plea, he shall be liable to pay the prosecutor the costs occasioned by such plea; and it also contains a provision which applies to every action for defamation, whether oral or written, viz.,

(*h*) As to this provision, see The Queen *v.* Newman, 1 Ell. & Bl. 558.

(*i*) See Chadwick *v.* Herapath, 3 C. B. 885.

(*k*) Vide 8 & 9 Vict. c. 75, s. 2.

that it shall be lawful for the defendant, (after notice in writing of his intention so to do, duly given to the plaintiff at the time of pleading,) to give in evidence in *mitigation of damages*, that he made or offered an apology to the plaintiff, before the commencement of the action,—or as soon afterwards as he had an opportunity, in case the action had been commenced before an opportunity could be found (*l*).

[A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him (*m*); which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages,—either by an action of *conspiracy*, which cannot be brought but against two at the least,] and is confined to the particular case where the plaintiff has been acquitted by verdict, upon an accusation of treason or felony (*n*);—or, (which is the only way now known in practice,) by [an action on the case for a false and malicious prosecution:] which may be brought either against a single person, or against several, with an allegation that they conspired together for the purpose (*o*). And [an action on the case for a malicious prosecution, may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded (*p*). However,

(*l*) The 6 & 7 Vict. c. 96, moreover contains provisions as to the *punishment* on an indictment, or information, for libel in the several cases of libelling or threatening to libel, in order to extort money, &c. —of publishing a libel knowing the same to be false—and of publishing a libel without such knowledge. As to these, see bk. VI. c. X.

(*m*) See Turner *v.* Ambler, 10 Q. B. 252.

(*n*) 1 Saund. by Wms. 229 a.

(*o*) Ibid.

(*p*) See Jones *v.* Gwynn, 10 Mod. 219, 220; Chambers *v.* Robinson, Str. 691.

[any probable cause for preferring it, is sufficient to justify the defendant.] Indeed, in order to maintain this action, the burthen lies on the plaintiff of showing that no probable cause existed (*q*): and it is also essential for him to prove either that he was acquitted upon such prosecution, by verdict of a jury; or that it was in some other manner legally terminated in his favour (*r*). No action, (it may be observed here,) lies in a court of law for a malicious prosecution before a court-martial (*s*); for "every reason "which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause "by that jurisdiction (*t*)."

6. Injuries affecting the right of personal liberty are, in the first place, that of [false imprisonment: for which the law has not only decreed a punishment as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets (*u*). Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having

(*q*) As to the nature of this action, see Blackford *v.* Dod, 2 B. & Adol. 179; Delisser *v.* Towne, 1 Q. B. 333; Panton *v.* Williams, 2 Q. B. 169; Musgrove *v.* Newell, 1 Mee. & W. 582; Michell *v.* Williams, 11 Mee. & W. 205.

(*r*) Morgan *v.* Hughes, 2 T. R. 225; Willes, 520, n.; Whitworth *v.* Hall, 2 B. & Adol. 695.

(*s*) As to courts martial, vide sup. vol. II. p. 596.

(*t*) Johnstone *v.* Sutton (in error), 1 T. R. 549.

(*u*) 2 Inst. 589.

[power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted for the necessity of the thing,—such as the arresting of the felon by a private person without warrant, or the impressment of mariners for the public service. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute 29 Car. II. c. 7, s. 6, hath declared that such service of process,] except in cases of treason, felony, breach of the peace, or other indictable offence (x), [shall be void. This is the injury. As for the remedy,] it is either for *removal* of the injury, or for its *satisfaction* in damages.

The means of *removal* are principally by writ of *habeas corpus*. But this is a subject on which it would be premature at present to enter, as it belongs to a subsequent chapter, in which are treated certain remedies in the common law courts distinct from the remedy by action (y). [The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass, usually called an action of false imprisonment; which is generally and almost unavoidably accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he had received (z).]

But, besides the injury of false imprisonment, the right of personal liberty may, secondly, be invaded by an arrest under process; lawful in itself, and executed at a lawful time, and in a lawful manner, but improperly set on foot by a party who had in fact no sufficient ground or even probable cause for taking that course; and this may be either in the way of a civil or criminal proceeding. In the

(x) See Rawlins v. Ellis, 16 Mee. & W. 172.

(y) Vide post, bk. v. c. XII.

(z) See as to false imprisonment, Edgell v. Francis, 1 Man. & Gr. 222; Glynn v. Houstoun, 2 Man. & Gr. 337; Jones v. Gurdon, 2 Gale & D. 133; Smith v. Eggington, 7 Ad. & El. 167; Mitchell v. Forster, 12 A. & E. 72; Bird v. Jones, 7 Q. B. 742; Turner v. Ambler, 10 Q. B. 252.

former case the injury is generally described as a *malicious arrest* (*a*); in the latter as a *malicious prosecution*, of which enough has already been said in reference to the injury it inflicts on reputation (*b*). As to malicious arrest it is only another species of the same injury, and is redressed in the same form of action, viz., trespass on the case; and the law relating to it being in almost every other respect the same, does not require to be repeated. Indeed the occasions of malicious arrest have now become rare in consequence of the late change of the law (*c*); by which arrests in civil suits before judgment obtained, are no longer allowable, except under special circumstances, and under the authority of a judge's order.

II. We arrive next, according to the order proposed, at the consideration of such injuries as affect the right of *property* in things *real;* or (as they may be more compendiously described), injuries to real property.

These [are principally six:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.]

1. *Ouster*, or dispossession, is a wrong or injury that may be sustained in respect of hereditaments corporeal or incorporeal (*d*); and [carries with it the amotion of possession; for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right, to seek his legal remedy in order to gain possession and damages for the injury sustained (*e*). And

(*a*) See as to malicious arrest, Saxon *v.* Castle, 6 Ad. & El. 652; Smith *v.* Eggington, 7 Ad. & El. 167.

(*b*) Vide sup. p. 470.

(*c*) Vide statute 1 & 2 Vict. c. 110; et post, bk. v. c. x.

(*d*) 3 Bl. Com. 170. The idea of ouster, however, is more directly applicable to a corporeal hereditament, or *land*. As regards those which are incorporeal, it is in general, as Blackstone remarks, "nothing "more than a disturbance of the "owner in the means of coming at "or enjoying them;" and therefore it was always held that a disseisin of these amounted to an ouster only at the *election* of the party injured, —if, for the purpose of more easily trying the right in a real action, he was pleased to suppose himself disseised. (3 Bl. Com. 170.)

(*e*) There may be ouster between tenants in common, coparceners and

[such ouster or dispossession may either be of the *freehold*, or of *chattels real.*]

Ouster of the *freehold* is effected by various methods: 1. [By *abatement;* which is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold; this entry by him is called an abatement and he himself is denominated an abator (*f*).] 2. [By *intrusion;* which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon after such death of the tenant, and before any entry of him in remainder or reversion (*g*);] such stranger being termed, in the technical sense of the word, an intruder. 3. [By *disseisin* (*h*);] which is [a wrongful putting out of him that is seised of the freehold:] not, as in the other cases, a wrongful entry where the possession was vacant, but [an attack upon him who is in actual possession, and turning him out of it;] and as the two former kinds were [an ouster from a freehold in law,] so this is [an ouster from a freehold in deed.] All these three modes, it is to be observed, are [such

joint tenants. Co. Litt. 199 b, 373 b; Smales *v.* Dale, Hob. 120.

(*f*) Finch, L. 195. Blackstone remarks, that this "expression of "*abating*, which is derived from the "French, and signifies to quash, "beat down, or destroy, is used by "our law in three senses. The first, "which seems to be the primitive "sense, is that of abating or beating "down a nuisance, (and in a like "sense it is used in stat. Westm. 1, "3 Edw. 1, c. 17, where mention is "made of abating a castle or for-"tress); the second is that of abating "a writ or action, where it is taken "figuratively, and signifies the over-"throw or defeating of such writ by "some fatal exception to it; the last "is also a figurative expression, to "denote that the rightful possession "or freehold of the heir or devisee "is overthrown by the rude interven-"tion of a stranger." (3 Bl.Com. 168.)

(*g*) Co. Litt. 277; F. N. B. 203, 204.

(*h*) As to disseisin, see Taylor *v.* Horde, 1 Ld. Ken. 143; Doe *d.* Maddock *v.* Lynes, 3 B. & C. 388; Doe *v.* Hall, 2 Dow. & Ry. 38; William *v.* Thomas, 12 East, 141.

[wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful; but the two remaining are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.]. As, 4. [By *deforcement;* this, in its most extensive sense, is *nomen generalissimum;* a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right (*i*). So that this includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seigniory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him (*k*): here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; but being neither of these three, it is therefore a *deforcement* (*l*). If a man marries a woman, and during the coverture is seised of lands] in fee simple, or fee tail, [and is disseised and dies; or dies in possession;] no act having been done in either of these cases to bar or defeat his widow's dower (*m*); [and the disseisor or heir enters on the tenements, and doth not assign the widow her dower, this is also a deforcement to the widow, by withholding lands to which she hath a right (*n*);] that is, by remaining in possession of the entire lands of the de-

(*i*) Co. Litt. 277. Et vide as to deforcement, Co. Litt. by Butl. 331 b, n. (1).

(*k*) Vide sup. vol. I. p. 132.

(*l*) F. N. B. 143.

(*m*) Vide sup. vol. I. p. 267.

(*n*) F. N. B. 8, 147.

ceased, without setting forth for her any particular lands, in satisfaction of her general claim to one-third. [In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestui que vie*, and the lessee or any stranger who was, at the expiration of the term, in possession, holds over, and refuses to deliver the possession to him in remainder or reversion,—this is likewise a deforcement (*o*).] Another species of deforcement is [where two persons have the same title to land, and one of them enters and keeps possession against the other,—as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety: this is also a deforcement (*p*).] In addition to all which modes of ouster, there was formerly another, viz., 5. By *discontinuance;* which was where a tenant in tail in possession made [a feoffment (*q*) in fee simple, or for the life of the feoffee, or in tail,—all which are beyond the power of a tenant in tail to make; for that by the common law extends no further than to make a lease for his own life,] so as to be available against the issue or those in remainder or reversion (*r*). Such feoffment would formerly pass an estate in fee simple by *wrong;* and therefore on the death of the feoffor became an injury to the heir in tail, or those in remainder or reversion, (as the case might be,) which was termed a discontinuance (*s*). But now, by 8 & 9 Vict. c. 106, s. 4, a feoff-

(*o*) Finch, L. 263; F. N. B. 201, 205—7.

(*p*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.

(*q*) Prior to the abolition of fines by 3 & 4 Will. 4, c. 74, a discontinuance might also be effected by a fine. (Co. Litt. 327 b.)

(*r*) Blackstone (vol. 3, p. 172) lays it down absolutely, that his power extends no further than to make a lease for his own life; and this is according to the text of Littleton. But the qualification above introduced is required to make that proposition an accurate one. See Co. Litt. by Butl. 331 a, n. (1).

(*s*) Co. Litt. 327 b.

ment made after the 1st October, 1845, shall not have any tortious operation; so that the title by discontinuance seems to be abolished (*u*).

Secondly. Ouster of *chattels real* consists—1. Of [amotion of possession from estates held by statute, recognizance, or elegit (*x*);] which happens by [a species of disseisin, or turning out of the legal proprietor before his estate is determined, by raising the sum for which it is given him in pledge.] And 2. Of [amotion of possession from an estate of years (*y*),] which also takes place [by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term.]

[The several species and degrees of injury by ouster being thus ascertained (*z*), the next consideration is the remedy.]

But for the better illustration of this subject, on which great changes have been recently introduced, it will be necessary here to take some retrospect of the *former* state of the law with respect to the means of redress for a wrongful ouster.

According to that system the injury admitted of a variety of remedies, the competency of which depended on the lapse of time and other circumstances; and the distinctions which obtained on this subject may be compendiously stated as follows:

First. In the case of abatement, intrusion and disseisin,

(*u*) This important effect formerly belonged to a discontinuance, that it took away the entry of the heir in tail, remainderman, or reversioner (as the case might be). But the law was altered in this respect by 3 & 4 Will. 4, c. 27. As to an estate by *wrong*, vide sup. vol. I. p. 512.

(*x*) Vide sup. vol. I. pp. 309, 310.

(*y*) Ibid. p. 282.

(*z*) It may be proper to remark, that the abolition of almost all the *real* actions has, to a considerable extent, abated the importance which formerly belonged to the distinctions regarding the different kinds of ouster. The subject, therefore, has been treated rather more summarily than in Blackstone.

the party ousted might recover the possession by means of an action, that is, by one of the real, (in which we always include, unless the contrary is indicated, mixed,) actions: which were divided into two principal classes, viz., actions *possessory*, in which the object was to ascertain the right of possession; and actions *droitural*, brought to determine the right of property (*a*). But, as in the particular cases of ouster just mentioned, the abator, intruder, and disseisor, had obviously a mere naked possession without colour of right, the law also gave the injured party the alternative in such cases of recovering possession at once, (where land was the subject of the ouster,) by the extra-judicial and summary method of *entry* mentioned in the first chapter of the present book (*b*). If he neglected, however, to avail himself of this for twenty years, (being under no disability in respect of infancy or the like,) his entry after that time was barred by the statute of limitations, 21 Jac. I. c. 16.

Next, if the abator, intruder, or disseisor died seised, and the land descended to his heir, or (in general) if the ouster took place by any of the species of deforcement, the heir or the deforciant (as the case might be) was considered as clothed with a species of presumptive title, called by Blackstone an *apparent right of possession* (*c*); for the heir in respect of his descent, and the deforciant in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin. Under such circumstances, therefore, the possessors were deemed not liable to expulsion by mere entry, but the estate or interest of the

(*a*) 2 Bl. Com. 197; 3 Bl. Com. 179. The actions possessory were divided into writs of *entry* and writs of *assize*; the former being of such a nature as *disproved* the title of the tenant by showing the unlawful commencement of his possession; the second of a nature to *prove* the title of demandant, by merely showing his, or his ancestor's, possession. 3 Bl. Com. 185.

(*b*) Vide sup. p. 337.

(*c*) 2 Bl. Com. 196; 3 Bl. Com. 179.

person ousted, was said to be *turned to a right* (*d*); and it became necessary for him to resort to a real action, either possessory or droitural. So he might be driven to betake himself to a real action even as against an abator, intruder, or disseisor; in consequence of having allowed twenty years to elapse without exercising his right of entry.

Here, however, it becomes necessary to notice the following exceptions:—First, that though in general the right of entry, as already stated, was taken away (or *tolled*), by the descent so *cast*, (as the term was,) upon the heir of the abator, intruder, or disseisor; yet if the claimant were under any legal disability during the life of the ancestor, by whom the ouster was effected,—such as infancy, or the like,—the descent had no such operation. Secondly, that by the statute 32 Henry VIII. c. 33, if the ouster took place by way of *disseisin*, no descent to the heir of the disseisor was to take away the entry; unless the disseisor himself had peaceable possession for five years. Lastly, that though in general there was no right of entry on a *deforciant*, yet a man might enter on his tenant at sufferance, [for such tenant hath no freehold, but only a bare possession, which may be defeated, like a tenancy at will, by the mere entry of the owner (*e*).]

Again, if the claimant, where his estate was turned to a right in the manner above described, neglected to resort to his possessory action within the period allowed by law in that behalf; (for every such action was subject to its appropriate time of limitation, varying from thirty to fifty years;) or if the ouster took place upon a discontinuance,—in either of these cases the adverse party was considered as having

(*d*) By *turning to a right* it is "generally meant, that the person "whose possession is usurped can- "not restore it by entry, and can "only recover it by action."—Co. Litt. by Butl. 332 b, n. (1). Blackstone uses this expression as if it applied to the case where not only the entry, but the right to bring a possessory action was taken away, and nothing remained but the mere *right*, or *right of property*. (2 Bl. Com. 197.) But this is not the sense in which it has been ordinarily used.

(*e*) As to tenant at sufferance, vide sup. vol. I. p. 293.

acquired not merely an apparent, but an actual *right of possession* (*f*)—the effect of which was that the claimant was driven, (as the only remaining expedient,) to bring his real action droitural, in order to establish his *right of property*, or *mere right*, as it was also denominated (*g*); and by the establishment of the right of property, the right of possession was defeated. Of such actions, the principal one was the *writ of right* (*h*); sometimes called, to distinguish it from others of the droitural class, the writ of right *proper*. They were all subject, like actions possessory, to a certain period of limitation, that in the writ of right, (which was the most extended,) being sixty years.

But though this was the antient and proper system of remedy provided by our law, for cases of ouster of land, it had long been nearly superseded in practice, by a comparatively modern invention of anomalous character, to which claimants had been driven to resort by the inadequacy of the regular methods. For the redress by entry was, one rarely in fact available,—particularly as the law required it to be made in a peaceable manner, and subjected to severe penalties those who attempted to regain their tenements by a strong hand. And with respect to

(*f*) 2 Bl. Com. 196; 3 Bl. Com. 179. These were the principal cases; but there was also that of judgment being given against either party, (whether by default or on trial of the merits,) in a possessory action —for such judgment for ever bound the right of possession. (3 Bl. Com. 191.)

(*g*) 2 Bl. Com. 197.

(*h*) There was an instance of a writ of right, commenced as recently as the year 1835. (See Davies *v.* Lowndes, 1 Bing. N. C. 597; S. C. 1 C. B. 435; 3 C. B. 808.) The writ of right was considered as "the highest writ in the law." (3 Bl. Com. 193.) But, besides this, there were writs *in the nature* of a writ of right; such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance, for he could not have a writ of right proper. Ibid. 191 (see also Tolson *v.* Kaye, 6 Man. & G. 536; Cannon *v.* Rimington, 12 C. B. 1, 514). It was competent to the tenant, when sued in a writ of right, to plead that he had more right to hold than the demandant to claim; which was called the *mise* upon the mere right; and this question, or issue, he might at his option refer, either to a species of jury called the *grand assise*, or to *trial by battle*; as to which, vide post, bk. VI. c. XXII.

the real actions, whether possessory or droitural, they were generally unacceptable remedies, from their liability to the following disadvantages—that the course of proceedings in them was dilatory and intricate (i);—that the judgment in them was conclusive, (so that the plaintiff, failing by any accident in one, was not at liberty to bring another of the same species (k));—and that they could be brought only in one of the courts of Westminster Hall, viz., the Court of Common Pleas (l). From such disadvantages, however, personal actions were exempt; and the practitioners of our courts were thus led to the device of adapting one of these to the object of recovering the possession of land, so as to preclude the necessity of resorting to an action real. This invention appears to be due to the reign of Henry the seventh, or Henry the eighth (m); and the personal action applied to the purpose, was the species of trespass called trespass *de ejectione firmæ*, (afterwards compendiously called *an ejectment*, and ranked, by some, contrary to its original character, as a mixed action,)—which lay where the plaintiff was a lessee for years, and claimed damages for the injury of ouster from his chattel real. The contrivance was preceded by a decision of the courts, declaring that, besides the judgment for damages, the plaintiff in an action of this kind was entitled to an award of restitution of the term itself (n); and this point being once established, the object in view was obtained through the medium of a fiction, the nature of which will be more par-

(i) 3 Bl. Com. 184, 205; Reeves's Hist. Eng. L. vol. iv. p. 166.

(k) Reeves's Hist. Eng. L. vol. iv. p. 166.

(l) Ibid. 170.

(m) Ibid., where it appears that it was not till the reign of Henry the eighth, that real actions began to give place to ejectments; though the practice of applying ejectments occasionally to the trial of titles, began as early as Henry the seventh. (Et vide 3 Bl. Com. 201.)

(n) So adjudged, in the fourteenth year of Henry the seventh; and the same doctrine had been previously laid down by Fairfax, 7 Edw. 4, 6 b, though the contrary had been held in the time of Edward the third and Richard the second. The courts of law seem to have adopted this new doctrine in emulation of the practice

ticularly noticed hereafter; and of which it is sufficient at present to say, that it had the effect of enabling any party who had been ousted of land,—whatever the nature of his title or the circumstances of the ouster might be,—to bring his case forward in the name of a third person claiming in the character of his lessee for years, and complaining of an expulsion from the leasehold. Its applicability, however, was subject to this important exception; that as it involved an actual entry made, or supposed to be made, by the true claimant, on the lands in dispute for the purpose of making the pretended lease,—it being held that a person out of possession could not lawfully convey title to another (*o*),—the fiction was incapable of being applied, except where such claimant had a *right of entry*; the effect of which exception was, that though real actions were in general supplanted by ejectment soon after its introduction, yet recourse was still necessarily had to the former kind of remedy in some particular instances. The principal of these were the case where a woman claimed dower; or where the ouster, which was the subject of complaint, had taken place by way of abatement, intrusion, or disseisin, and had been followed by a descent cast, or a lapse of twenty years without entry made; or where it had taken place by way of discontinuance;—in the first of which cases it is to be observed, that there was no right of entry in the widow, but only a right to have her portion of land set forth; and in the three last, viz., the descent cast, the non-entry for twenty years, and the discontinuance,—the right of entry, which had once existed, was at an end (*p*).

of the courts of equity, which obliged the ejector to make specific restitution. See 3 Bl. Com. 200; Reeves's Hist. Eng. L. vol. iii. p. 390; vol. iv. p. 165; and 1 A. & E. 751, (n.)

(*o*) To convey a title to another, when the grantor is not in possession of the land, falls under the legal offence of maintenance; and indeed "it was doubted at first," says Blackstone, "whether this occasional possession in ejectment," taken merely for the purpose of conveying the title, "excused the lessor "from the legal guilt of maintenance."—3 Bl. Com. 201.

(*p*) The account above given of the former state of the law relating

And such continued to be the state of the law with respect to the remedy upon ouster of land, during the long period that elapsed between the time of Henry the eighth and that of William the fourth; but in the latter reign,—the attention of the legislature having been particularly called to the improvement of our legal institutions, and among the rest to those which related to real property,—it was deemed expedient, as regards the three last cases of ouster above enumerated, to place the law upon a different basis. For it seemed unjust to the true owner of land, from whom the possession was withheld, to allow his right of entry to be defeated by such circumstances as those of descent cast and discontinuance; and inexpedient on the other hand to allow him any remedy whatever, after he had neglected to vindicate his right for more than twenty years, the period to which the proceeding by entry, and consequently by ejectment, had already been long confined. It appeared desirable, too, to expunge real actions in general from our list of remedies, as the greater part of them had been latterly found to be mere instruments of mischief in the hands of unprincipled practitioners; who employed them "to defraud persons in a low condition of life, of their substance, "under pretence of recovering for them large estates, to "which they had no colour of title" (r). Under the influence of these views (suggested by the Real Property Commissioners, to whose labours we have before had occasion to refer), an Act was passed in the year 1833, (3 & 4 Will. IV. c. 27,) containing *inter alia* the following provisions—that no descent cast or discontinuance happening after 31st Dec. 1833, should toll or defeat any right of

to real actions, is purposely condensed to the highest degree consistent with clearness of exposition. What Blackstone has written on this subject is much more copious, and exhibits a learning and ability not surpassed, perhaps, in any part of his Commentaries; but the recent changes of the law have almost annihilated the value of that part of his labours. Vide Bl. Com. bk. iii. c. 10.

(r) First Report of Real Property Commissioners, p. 42.

entry, or action for the recovery of land—that except in certain cases of disability therein specified, no entry should be made or action brought to recover land, but within twenty years after the right accrued—and that no action, real or mixed, except writ of right of dower, dower *unde nihil habet*, *quare impedit*, or ejectment (s), should be brought after 31st Dec. 1834,—with a saving only of some particular cases in which the right to bring an action of this description was preserved for a few years longer.

We may now advert to the *present* modes of remedy in the case of ouster; and, first, in the case of land, or hereditaments corporeal. The only proper remedy here, is by way of specific recovery; a mere action for damages, though it will also lie, being in general obviously inadequate to the nature of the injury; and the only modes of obtaining a specific recovery, which are generally applicable, are by entry or by the action of ejectment; (that is, an action newly modelled upon the antient ejectment, discarding its fictions, but retaining its character in substance, and its name (t)—there being, however, besides these, the two actions of dower formerly enumerated, by which redress is given for one particular species of deforcement (u).

(s) Ejectment is here ranked as a mixed action, but not with absolute propriety, vide sup. p. 448.

(t) See the alterations made in the action of ejectment by the Common Law Procedure Act, 1852, as explained post, c. XI.

(u) There are some particular cases of ouster for which particular remedies are provided, besides those above specified. In the case of a *forcible entry* and ouster (vide sup. p. 338), the statutes against forcible entries and detainers give the power to justices of the peace to restore possession. In cases between landlord and tenant,—where half-a-year's rent is in arrear, and the tenant has deserted the premises and left the same uncultivated or unoccupied, without any sufficient distress thereon,—the statutes 11 Geo. 2, c. 19, s. 16; and 57 Geo. 3, c. 52, (and within the metropolitan district, 3 & 4 Vict. c. 84, s. 13; 11 & 12 Vict. c. 43, s. 34, as to which, see Edwards *v.* Hodges, 15 C. B. 477,)—authorize a proceeding before two justices of the peace to obtain restitution. (See Ashcroft *v.* Bourne, 3 B. & Ad. 684; Delaney *v.* Fox, 1 C. B. (N. S.) 166.) By 59 Geo. 3, c. 12, ss. 17, 24, 25, also, pau-

Of entry, enough has been already said. As to ejectment, it is to be remarked, that it lies (as may be collected from preceding matter,) wherever there exists a right of entry in the claimant; which indeed comprises, since the alterations introduced by the above-mentioned statute of 3 & 4 Will. IV. c. 27, almost every case in which there is any right to recover land, whatever may be the nature of the title, or of the ouster sustained (*v*). On the other hand, an ejectment cannot, as we have seen, be maintained where there is *no* right of entry; and therefore it will not lie for dower, nor (in general) upon an ouster of any hereditaments incorporeal; though in the particular case of an ouster of *tithes*, it is otherwise; for that form of action is given [for tithes in the hands of lay appropriators, by the express purview of the statute of 32 Hen. VIII. c. 7; which doctrine has since been extended by analogy to tithes in the hands of the clergy.]

As to the two actions of dower, which, (as we have seen,) are the remedies for the particular case of a widow ousted of her dower, they are both of the class of real actions (*w*). The first of them,—the writ of right of dower, (which was one of the varieties of the writ of right proper (*x*),) has been at all times of rare occurrence; being adopted only in the very particular predicament of the widow's having been

pers intruding into parish property may also be dispossessed by warrant of two justices of the peace. By 1 & 2 Vict. c. 74, (see Jones *v.* Chapman, 14 Mee. & W. 124,) a method of obtaining possession, under a magistrate's warrant, is provided for landlords in certain cases of holding over by tenants, when the rent does not exceed 20*l.* And by 19 & 20 Vict. c. 108, s. 50, possession of land in the case of landlord and tenant, where the tenant holds over, and, where neither the value nor rent exceeded 50*l.*, and no fine or premium has been paid, may be recovered by plaint in the County court of the district. (Vide sup. vol. I. p. 295; et sup. p. 382, n. (*a*).

(*v*) It lies between tenants in common, coparceners, or joint tenants, upon an actual ouster of one by the other. (Co. Litt. 199 b; Doe *v.* Hind, 11 East, 49.) So, one of several tenants in common, &c. may bring ejectment for his share against a stranger. (Roe *v.* Lonsdale, 12 East, 39.)

(*w*) Co. Litt. 31 a.

(*x*) 3 Bl. Com. 183.

endowed of parcel and being deforced of the residue, lying in the same town, by the wrong of the same tenant. It is the other species of dower, *unde nihil habet*, which we commonly understand when an action of dower generally is mentioned; for of this some instances occasionally, though very rarely, still occur (*y*), while the kind first mentioned is absolutely unknown in modern practice. Dower *unde nihil habet*, though not a writ of right proper, was one of the droitural division; being founded not on the possession, but the right of property. It must be brought by the widow, as demandant, against the tenant of the freehold, that is, the heir or his alienee (*z*); and its effect is to enable the former to recover from the latter the seisin of a third part of the tenements in demand, to be set forth to her in severalty by metes and bounds, together with damages and costs (*a*). That it has fallen so much into disuse, is attributable partly to the circumstance that the Court of Chancery exercises a concurrent jurisdiction with the Court of Common Pleas, where the object is to obtain as assignment of dower, and the title of the dowress is not in dispute (*b*). As to the particular forms of proceeding, whether in ejectment or dower,—that subject must be postponed till we arrive at a subsequent part of this volume, where it is intended to explain the course of these and other actions (*c*).

With respect to the remedy upon ouster of hereditaments incorporeal,—such as commons, advowsons, and the like,—these also, it is said (*d*), may be claimed in the action of dower, supposing the claimant to be a dowress; and tithes may be recovered (as we have seen) in ejectment: and a next presentation, (as we shall see hereafter,) in an action of

(*y*) See a recent case (1849), Garrard, *dem.*, Tuck, *ten.*, 8 C. B. 231.

(*z*) Com. Dig. Pleader, 2 Y. 15; 2 Saund. by Wms. 43 (*a*).

(*a*) 2 Saund. by Wms. 44 (*c*). By 3 & 4 Will. 4, c. 27, s. 41, arrears of dower cannot be recovered for more than the last six years.

(*b*) Rosc. Real Actions, 40; Chit. Gen. Pr. vol. i. p. 380; vol. ii. p. 420.

(*c*) Vide post, bk. v. cc. x. xi.

(*d*) Rosc. Real Actions, 40.

quare impedit. But, subject to such particular exceptions, there is in general, (since the abolition of the mass of real actions,) no remedy by which incorporeal hereditaments can be specifically recovered; but the party injured may resort to the personal action of trespass on the case, in which he recovers such damages as he may have sustained by the invasion of his right (*e*). And this in general amounts to as complete a vindication of it as if he had obtained judgment for its specific recovery.

2. Having considered the injury of ouster, we now arrive at that of *Trespass;* by which is here intended a trespass committed in respect of another man's *land,* by entry on the same without lawful authority; which, as distinguished from trespass to his person or his goods, is technically called trespass *quare clausum fregit* (*f*). [For the right of *meum et tuum* (or property) in lands, being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a transgression;] and, being in the nature of an immediate and forcible injury thereto, a trespass. [The Roman laws indeed seem to have made a direct prohibition necessary, in order to constitute this injury. "*Qui alienum fundum ingreditur, potest a domino, si is præviderct, prohiberi ne ingrediatur* (*g*)." But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action will lie] to recover such

(*e*) See Challenor v. Thomas, Yelv. 143.

(*f*) As to the definition of trespass in general, vide sup. p. 4[illegible].

(*g*) Inst. 2, 1, 12.

damages as a jury may think proper to assess (*h*); and this injury is called trespass *quare clausum fregit* (*i*),—for breaking a man's *close*,—because [every man's land is, in the eye of the law, inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.]

One must have an actual possession (*k*) by entry, to be able to maintain an action of trespass *quare clausum fregit:* and [before such entry and possession one cannot maintain this action, though he hath the freehold in law (*l*). And therefore an heir, before entry (*m*), cannot have his action against an abator; and though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land, yet he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry: but then he may well maintain it for the intermediate damage done; for after his re-entry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him (*n*). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress,

(*h*) In case of the offence called *forcible entry*, (vide sup. p. 338,) an action will also lie by statute to recover treble damages. But this applies only to a degree of force calculated to excite fear; (R. *v.* Smith, 5 Car. & P. 201); and a proceeding under the statutes of forcible entry is not very usual.

(*i*) This species of action is so called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit.*

(*k*) 2 Roll. Abr. 553; Wheeler *v.* Montefiori, 2 Q. B. 133. Blackstone says, (vol. iii. p. 210,) "that there "must be a *property*, either abso-"lute or temporary, in the soil, and "actual possession by entry." It is clear, however, that he who has any exclusive possession may maintain the action, though he has no other property or interest. See Lambert *v.* Stroother, Willes, 221; Catteris *v.* Cowper, 4 Taunt. 547; Com. Dig. Trespass.

(*l*) 2 Roll. Abr. 553. As to freehold in law, vide sup. vol. I. p. 287.

(*m*) 2 Roll. Abr. 553.

(*n*) 11 Rep. 5.

[which was calculated merely for injuries committed on the land while in the *possession* of the owner. But now by the statute 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers.]

[A man is answerable for not only his own trespass, but that of his cattle also: for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, or spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrein the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction (*o*); or else by leaving him to the common remedy, *in foro contentioso*, by action.]

In some cases a trespass *quare clausum fregit*, by entry on another's land or house, is justifiable; as where it is done in exercise of a right of way, a right of common, or the like; or where [a man comes thither to demand or pay money there payable; or to execute, in a legal manner, the process of the law;] or by the licence of the plaintiff himself. [Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrein for rent; and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing (*p*);]

(*o*) As to this, vide sup. p. 341.

(*p*) Blackstone (vol. xii. p. 213) notices also, and apparently holds, the opinion, that by the common law of England the poor are allowed to enter on a man's ground and

and it has been held that [the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land,] if no greater damage be done than is necessary, [because the destroying such creatures is said to be profitable to the public (*q*). But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* (*r*): as if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner: this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*s*). But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract.] In like manner [if a landlord distreined for rent, and wilfully killed the distress, this by the common law made him a trespasser *ab initio* (*t*): and so indeed would any other irregularity have done, till the 11 Geo. II. c. 19, which enacts, that no subsequent irregularity of the landlord should make his first entry a trespass, but the party injured shall have a special action of trespass or on the case for the real specific injury sustained, unless tender of amends hath been made (*u*).]

3. We are next to consider the injury of *Nuisance*. [Nuisance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds; *public* or *common* nuisances, which affect the public, and are an annoyance to all the queen's subjects; for which reason we must refer them to the class of

glean after harvest. But it has been since his time decided that no such right exists. (Steel *v.* Houghton, 1 H. Bl 51.)

(*q*) Geush *v.* Mynns, Cro Jac. 321, Gundry *v.* Feltham, 1 T. R. 334. But see Earl of Essex *v.* Capel, coram Lord Ellenborough, Hertford Assizes, A.D. 1809, Chitty's Game Law, 31.

(*r*) 8 Rep. 461; Finch, L. 47; Bagshawe *v.* Goward, Cro. Jac. 148.

(*s*) 2 Roll. Abr. 561.

(*t*) Finch, L. 47.

(*u*) Vide sup. p. 352.

[public wrongs or crimes (x); and *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another (y),] and not amounting to a trespass (z). [We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

First, as to *corporeal* hereditaments. If a man builds a house so close to mine, that his roof overhangs my roof, and the water flows off his roof upon mine, this is a nuisance, for which an action will lie (a).] And the case is the same if the boughs of his tree are allowed to grow, so as to overhang my land, which they had not been accustomed to do (b). [Also, if a person keeps his hogs, or other noisome animals, so near the house of another,] previously built and inhabited (c), [that the stench of them incommodes him, and makes the air unwholesome,] this is a [nuisance, as it tends to deprive him of the use and benefit of his house (d). A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas:*" this, therefore, is an actionable nuisance (e).] And the case is the same if a man, by carelessness in excavating his own ground, causes the fall of a house erected on land adjoining (f). [But depriving one of a mere matter

(x) Vide sup. p. 334; et post, bk. VI. c. XII.

(y) F. N. B. 188.

(z) The definition, it is conceived, must be so qualified, both for the sake of accuracy and of clearness.

(a) F. N. B. 184.

(b) Norris v. Baker, 1 Roll. Rep. 393; Lodie v. Arnold, 2 Salk. 458.

(c) This is a necessary qualification; for if I build my house near his hog-sty, the case is altered, and it is *damnum absque injuria.* (1 Smith's Leading Cases, 131.)

(d) Aldred's case, 9 Rep. 58; R. v. White, 1 Burr. 337.

(e) Morley v. Pragnel, Cro. Car. 510.

(f) Dodd v. Holme, 1 Ad. & El. 493; and see Wyatt v. Harrison, 3 B. & Adol. 876; Humphries v. Brogden, 12 Q. B. 739; Smith v.

[of pleasure, as of a fine prospect by building a wall or the like;] or opening a window upon a neighbour, whereby his privacy is disturbed (*g*); [this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance (*h*).] The injuries that have been specified chiefly concern houses. As to *lands*, we may remark, that [if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance (*i*).] And upon the same principle it may be laid down generally, [that if one does any other act, in itself lawful, which yet being done in that place, necessarily tends to the damage of another's land, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also, if my neighbour ought to scour a ditch and does not, whereby my land is overflowed, this is an actionable nuisance (*k*).]

Next, as to *incorporeal* hereditaments (*l*), the principle of the law is the same. Thus, [it is a nuisance to stop or divert water that ought to run to another's meadow or mill (*m*);] or [if I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance; for, in the first case, I cannot enjoy my right at all; and in the latter, I cannot enjoy it so commodiously as I ought (*n*). Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or

Kenrick, 7 C. B. 515; Alston *v.* Grant, 3 Ell. & Bl. 128.

(*g*) Chandler *v.* Thompson, 3 Camp. 82.

(*h*) 9 Rep. 58.

(*i*) 1 Roll. Abr. 89.

(*k*) F. N. B. 184.

(*l*) As to these, vide sup. vol. I. p. 646.

(*m*) F. N. B. 184.

(*n*) F. N. B. 183.

[fair (*o*). But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir M. Hale (*p*) construes the *dieta*, or reasonable day's journey mentioned by Bracton (*q*), to be twenty miles; as indeed it is usually understood, not only in our own law (*r*), but also in the civil (*s*), from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance; for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *primâ facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it *may* be a nuisance; though whether it is so or not cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one (*t*). For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the queen's subjects; otherwise he may be grievously amerced (*u*). It would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it. Therefore it is no nuisance to erect a mill so near

(*o*) F. N. B. 184; 2 Roll. Abr. 140.

(*p*) On F. N. B. 184.

(*q*) L. 4, c. 46.

(*r*) 2 Inst. 567.

(*s*) Ff. 2, 11, 1.

(*t*) As to disturbance of ferries, see North and South Shields Ferry Company *v.* Barker, 2 Exch. 136; Blacketer *v.* Gillett, 1 L. M. & P. 88.

(*u*) 2 Roll. Abr. 140. As to the duties thrown by law on the lessees of ferries, see Willoughby, app., Horridge, resp., 22 L. J. (C. P.) 90.

[to mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in neighbourhood or rivalship with another: for by such emulation the public are like to be gainers; and if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ* (x).]

The remedy at law for this injury of nuisance is by action of trespass on the case (y), in which the party injured [may recover a satisfaction in damages for the injury sustained;] having also, as it may be recollected, the right to *abate* the nuisance by his own act, a subject of which we have already taken sufficient notice (z).

4. The fourth subject for consideration is *Waste* (a). This is spoil and destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments, by the tenant thereof during the continuance of his particular estate (b); [which the common law expresses very significantly by the word *vastum*; and this *vastum* or waste is either voluntary or permissive;] the one a matter of commission, as by pulling down a house, the other of omission only, as by suffering it to fall by want of necessary reparations. [Whatever does a lasting damage to the freehold or inheritance, is waste. Therefore the removing wainscot, floors, or other things once fixed to the freehold of a house, is,] generally speaking, waste; though it is held, by way of exception from the ordinary rule, that a par-

(x) Hale on F. N. B. 184.

(y) Among the real actions now abolished, there were two by which the actual removal of the nuisance might be effected, viz., the *assise of nuisance* and the writ of *quod permittat prosternere*; as to which, see 3 Bl. Com. 220.

(z) Vide sup. p. 338. It has also been the practice in many cases to resort to a court of *equity* for an injunction to stay or prevent the nuisance, a relief which may now be equally had in the common law court in which the action is brought. 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), s. 79, et seq.

(a) Vide sup. vol. I. pp. 258, 263, 287, 289, 293.

(b) Co. Litt. 53; 2 Bl. Com. 281; 3 Bl. Com. 223.

ticular tenant, who has made erections for the purposes of trade; or has put up ornamental fixtures of a kind removable without material damage; may lawfully remove them (*c*). [If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise if the house be burned by the carelessness or negligence of the lessee (*d*). In both these cases, however, it is to be understood that [a tenant bound by covenant or other express contract to keep the house in repair; is compellable to rebuild, unless the contract was made expressly subject to exception in the event of such inevitable accident.] Waste may also [be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*e*). Timber also is part of the inheritance (*f*). Such are oak, ash, and elm, in all places (*g*); and in some particular counties, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste (*h*). But underwood, the tenant may cut down at any seasonable time that he pleases (*i*); and he may take sufficient *estovers* (*k*), of common right, unless restrained (which is usual) by particular covenants or exceptions (*l*). The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow

(*c*) Vide sup. vol. II. p. 229.

(*d*) By 1 Ann. c. 31, 10 Ann. c. 14, and 14 Geo. 3, c. 78, it is however provided, that no action at suit of a person to whose premises a fire has spread, shall be brought against the person in whose house, chamber, or building, or on whose estate, the fire shall accidentally have begun.

(*e*) Co. Litt. 53.

(*f*) 4 Rep. 62.

(*g*) As to *willows*, see Phillips *v.* Smith, 14 Mee. & W. 589. As to *beech* trees, see Matthews *v.* Matthews, 7 C. B. 1018.

(*h*) Co. Litt. 53.

(*i*) 2 Roll. Abr. 817.

(*k*) Vide sup. vol. I. p. 257.

(*l*) Co. Litt. 41.

[or pasture, are all of them waste (m). For, as Sir Edward Coke observes (n), it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*. And the same rule is observed, for the same reason, with regard to converting one species of *edifice* into another, even though it is improved in its value (o). To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance (p); but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use (q); for it is now become the mere annual profit of the land.] In general, any acts or any neglects, destructive of the inheritance, are wrongful on the part of the tenant having any estate less than the inheritance (r). But a tenant in fee, whether fee-simple or fee-tail, is not impeachable for waste; nor is a tenant in tail, even after possibility of issue extinct, because his estate was at its creation an estate of inheritance (s). Nor is a lessee for life or years, if his lease be expressly made, as is sometimes the case, "without impeachment of waste" (t); neither does the law regard any act, by whomsoever committed, as amounting to waste, unless there be some substantial and considerable damage (u); and therefore in a case where the damage done was found to be less than 40*d*., judgment was given for the defendant (x).

The form of remedy for this injury is by action of trespass on the case by the person in reversion or remainder (y),

(m) Lord Darcy *v.* Askwith, Hob. 296.

(n) Co. Litt. 53.

(o) Cole *v.* Green, 1 Lev. 309.

(p) 5 Rep. 12.

(q) Lord Darcy *v.* Askwith, ubi sup.

(r) As to *permissive* waste, vide sup. vol. I. p. 258, n. (r), 287, 289, 293.

(s) Vide vol. I. p. 262.

(t) Even in these cases, however, a court of equity will not permit the tenant to *destroy* the premises, as by pulling down a house, &c. (Ashton *v.* Ashton, 1 Ves. sen. 264.)

(u) Doe *d.* Grubb *v.* Lord Burlington, 5 B. & Ad. 507.

(x) Vide the Governors, &c. of Harrow School *v.* Alderton, 2 Bos. & Pul. 86.

(y) Waste, properly so called, (as

against the wrong-doer, to recover such damages as a jury may award (*z*). Prior to the provisions of the late statute 3 & 4 Will. IV. c. 27, for abolition of real and mixed actions, there was also another remedy at law, in comparison with which, indeed, that by action on the case was but of recent introduction, viz. the mixed action of *waste*; in which, by the provisions of the Statute of Gloucester, (6 Edw. I. c. 5,) the place itself that was wasted might be recovered against the tenant, by way of forfeiture for the wrong committed, together with treble damages (*a*); and in aid of which, resort might also be had to a writ of *estrepement*, to prevent the commission of this injury *pendente lite* (*b*). But even before the abolition of these two last-mentioned proceedings by the statute above referred to, they had been for the most part supplanted by the personal action of trespass on the case; the action of waste having been subject to this inconvenience, that it could not be maintained, except by the

appears by its definition,) is an injury sustained by the reversioner or remainder-man on a particular estate. The term occurs however, occasionally, in the books, in a somewhat different sense. Thus when there is a person having common of estovers in any place, and the owner of the wood demolishes the whole wood and thereby destroys all possibility of taking estovers,—this is described as a species of waste. (See 3 Bl. Com. p. 224.)

(*z*) In this case of waste also, as well as in that of nuisance (vide sup. p. 494), it has been a common course to apply to a court of *equity* for an injunction; and relief by way of injunction may now be obtained in the *common law* court in which the action is brought, as well as in a court of equity. See 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), ss. 79—81.

(*a*) By our more ancient law, waste was not punishable in any tenant except guardian in chivalry, tenant in dower and tenant by the curtesy; and these were punishable only by way of damages (2 Inst. 146), except in the case of a guardian;—who forfeited his wardship by the provisions of the Great Charter (ibid. 300). But the Statute of Gloucester inflicted forfeiture and treble damages in the case of waste committed by tenant in dower, by the curtesy, for life, or years. It is to be observed, that there was no remedy by way of *entry*, in respect of a forfeiture of this kind. (Co. Litt. 233 b, 234 a.) It would seem therefore that ejectment is not maintainable; nor, since the abolition of the action of waste, any remedy by action whatever, to recover the land wasted.

(*b*) 3 Bl. Com. 225.

person who had the immediate reversion or remainder in fee or in tail, expectant on the estate of the person against whom the action was brought; whereas an action on the case may be maintained by a person having *any* immediate interest in expectancy (c). It is also to be observed with respect to this latter remedy, that it may be had not only against the tenant, but against any stranger by whom an act of waste has been committed; and that it will lie at the suit of one joint tenant, or tenant in common, against another, who has destroyed the subject of joint or common property (d); to which we may add that an analogous action on the case—called in this instance an action for *dilapidations* (e)—may also be maintained by a rector or vicar against his predecessor, or the executors of his predecessor, —and this for *permissive* as well as *voluntary* waste—it being held that the incumbent of a living is bound to keep the parsonage house and chancel in good and substantial repair; restoring and rebuilding where necessary, according to the original form (f).

5. [*Subtraction* is the fifth species of injury affecting a man's real property, and happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it.] And these consist in general of *fealty, suit of court, rent, and customary services.*

Fealty and suit of court are among the conditions upon which the antient lords granted out their lands to their feudatories; and consist in the obligation on the part of these tenants to take the oath of fealty (g) to the lord, and attend and follow his courts by serving on juries there: and of the same nature also are such *rents* as fall under the

(c) Co. Litt. 53 b, 54 a, 218 b; 2 Saund. by Wms. 252, n. (7).

(d) 1 Chit. Gen. Pr. 272.

(e) Vide sup. p. 66.

(f) As to this action, see Wise v. Metcalfe, 10 Barn. & Cress. 299; Bird v. Smith, 4 B. & Adol. 826; Downes v. Craig, 9 Mee. & W. 166; 1 Saund. 216 b, n. (a); Bunbury v. Hewson, 8 Exch. 558; Warren v. Lugger, ibid. 579; Bryan v. Clay, 1 Ell. & Bl. 38; Jenkins v. Betham, 15 C. B. 168.

(g) As to fealty, vide sup. vol. I. p. 673, &c.

legal denomination of rent service (*h*); these being the stated returns due either by antient or modern reservation, from the tenant to his lord,—whether in provisions, arms, or the like, or in money: to which last almost all rents are now reduced. And the subtraction or non-observance of [any of these conditions, by neglecting to swear fealty, to do suit, or to render rent,—is an injury to the freehold of the lord, by diminishing the value of his seigniory.] Besides which, there arises, whenever rent becomes due, (whatever may be its nature, and whether it is connected with the tenure or not,) a *debt* (*i*) between the parties; the non-payment of which is a pecuniary injury, independent of the wrong done to the freehold.

For fealty and suit of court, and in general for all rents, there is the peculiar remedy by *distress;* [and it is the only remedy at the common law, for the two first of these.] The nature of a distress has been already explained (*k*); and it may here suffice to remember that it is a taking of [personal chattels out of the possession of the wrong-doer into that of the party injured, to procure a satisfaction for a wrong committed. And for the most part it is provided that distresses be reasonable and moderate, but in the case of fealty and suit of court, no distress can be too large (*l*): for be it of what value it will, there is no harm done; as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and may be repeated from time to time until the stubbornness of the party is conquered, is called a *distress infinite.*] Besides the remedy by distress, the law also formerly provided, for the case of rent in arrear, several kinds of real action, viz. the assise of *mort d'ancestor* and that of *novel disseisin;* the writ *de consuetudinibus et servitiis;* the writ of *cessavit;* and the writ of right *sur disclaimer* (*m*). But

(*h*) As to rent service, vide sup. vol. I. p. 673.

(*i*) As to debt, vide sup. vol. II. p. 140.

(*k*) Vide sup. p. 339.

(*l*) Finch, L. 285.

(*m*) See as to these, 3 Bl. Com. 184, 232; Roscoe on Real Actions,

all such remedies having been long wholly disused, and now abolished by the late statute 3 & 4 Will. IV. c. 27, the only actions which now lie for rent are of the personal class. The nature of these will be more particularly explained, when we arrive at the consideration of that species of injury which consists of breach of contract.

As to *customary services*; the one of most frequent occurrence is that of [doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind, have been accustomed to grind their corn at a certain mill (*n*).] If under such circumstances, any of them go to another mill and withdraw their suit (their *secta, à sequendo*) from the antient mill, this is not only a damage, but an injury to the owner; because this custom might have a very reasonable foundation; [viz. the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition that, when erected, they should grind their corn there only.] And for this injury the owner might formerly [have a writ *de secta ad molendinum* (*o*), commanding the defendant to do his suit at that mill, or show good cause to the contrary.] In like manner, [the Register (*p*) informs us that a man may have a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi*; for suit done to his public oven or bakehouse, or to his kiln or malthouse,] or the like. [But besides these special remedies for subtraction, to compel the specific performance of the service due, an action on the case will also lie for all of them to repair the party injured in damages.] And the former remedies being now abolished by 3 & 4 Will. IV. c. 27, the action on the case is now the only means of redress.

63, 75, 32, 31. So there were several real actions to redress the oppressions of the lord; as the writ *ne injuste vexes*, and writ of *mesne*. See as to these, 3 Bl. Com. 234; Roscoe on Real Actions, 37, 38.

(*n*) As to this service or custom, vide Harbin *v.* Green, Hob. 233; Drake *v.* Wigglesworth, Willes, 654; Vyvyan *v.* Arthur, 1 B. & C. 410; Richardson *v.* Walker, 2 B. & C. 827; Richardson *v.* Capes, ibid. 841.

(*o*) F. N. B. 123. See as to this, Roscoe on Real Actions, 36.

(*p*) Fol. 153.

6. [The sixth and last species of real injuries is that of *disturbance;*] which is the wrongful obstruction of the owner of an incorporeal hereditament, in its exercise or enjoyment: and [we shall consider five sorts of this injury, —disturbance of *franchise;* disturbance of *common;* disturbance of *ways;* disturbance of *tenure;* and disturbance of *patronage.*

Disturbance of *franchise* (q), happens when a man has the franchise of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays (r), or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another, by distress, menaces or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other action, he is therefore entitled to sue for damages by an action on the case; or, in case of toll, may take a distress if he pleases (s).

The disturbance of *common* (t) comes next to be considered—where any act is done by which the right of another to his common is incommoded or diminished. This may happen, 1. Where one who hath no right of common puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts

(q) As to franchises, vide sup. vol. I. p. 662.

(r) As to waifs and estrays, vide sup. vol. II. pp. 546, 554.

(s) Heddy v. Wheelhouse, Cro. Eliz. 558.

(t) As to common, vide sup. vol. I. p. 649.

[to the same inconvenience. But the lord of the soil may by custom or prescription, (but not without,) put a stranger's cattle into the common (*x*); and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*y*).] In general, however, [if the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord or any of the commoners may] drive them off, or [distrein them *damage feasant* (*z*); or the commoner may bring an action on the case to recover damages;] or the lord, an action of trespass. 2. [Another disturbance of common is by surcharging it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, *sans nombre*, or *without stint*,] as it is more commonly called, [he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts (*a*); for the law will not suppose that at the original grant of the common the lord meant to exclude himself. The usual remedies for surcharging the common are either by distreining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord; or, lastly, by an action on the case for damages, in which any commoner may be plaintiff,] and that as well against the lord, as against another commoner (*b*). And, besides these, recourse might formerly be had to a writ of admeasurement of pasture,

(*x*) 1 Roll. Ab. 396.
(*y*) Co. Litt. 122.
(*z*) 9 Rep. 112.
(*a*) 1 Roll. Ab. 399.
(*b*) Freem. 273; 1 Saund. by Wms. 346, n. (2).

which is among the real actions now abolished. 3. In addition to the above, [there is another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled (*c*). This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common (*d*). Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they devour the whole herbage, and thereby destroy the common;] though, on the other hand, the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*e*). For each of these injuries the commoner might formerly have not only his action of trespass on the case, but a real action of *novel disseisin* or *quod permittat* (*f*): but the latter remedies being now abolished, the former is now the only form of action available in such cases; though in certain instances, as where the obstruction is occasioned by a fence or wall, the law allows the commoner to *abate*, or throw it down (*g*). 4. In the last place may be noticed the injury of depasturing forest, commons and open fields with sheep or lambs infected with scab or mange; for remedy of which it is provided by 38 Geo. III. c. 65, *inter alia*, that the offender shall be liable to a pecuniary penalty on conviction before a justice of the peace (*h*).

(*c*) It is to be remembered, however, that the lord, or other proprietor of the waste, may *approve*, that is, inclose the land, and convert it to the uses of husbandry, provided he leaves sufficient common to the tenants, according to the proportion of their land. As to this, vide sup. vol. I. p. 654.

(*d*) Leverett *v.* Townshend, Cro. Eliz. 198.

(*e*) Bellew *v.* Langdon, Cro. Eliz. 876; Hadesden *v.* Gryssel, Cro. Jac. 195; Hassard *v.* Cantrell, Lutw. 108; 3 Bl. Com. 237.

(*f*) See 3 Bl. Com. 220; Roscoe, Real Actions, 40.

(*g*) 1 Saund. by Wms. 353 a. The commoner, however, cannot cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows; but his remedy is by action on the case only. Ibid.

(*h*) As to depasturing diseased sheep on uninclosed land, see also 11 & 12 Vict. c. 107, s. 2.

[The third species of disturbance, that of *ways*, is very similar in its nature to the last;] it principally happening when a person who hath a right of way over another's grounds [is obstructed by inclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done.] But as this mode of disturbance in general amounts to the injury of nuisance, which we had occasion to consider in a former place (*i*), it will not be necessary to dilate upon it under the present head. We shall only add therefore that the remedy is by action on the case.

[The fourth species of disturbance is that of *tenure*, or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord (*k*), and gives him a reparation in damages against the offender by an action on the case.

The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage;* which is a hindrance or obstruction of the patron to present his clerk to a benefice (*l*).

This injury was distinguished at common law from another species of injury, called *usurpation;* which is an absolute ouster or dispossession of the patron, and happens

(*i*) Vide sup. p. 490.

(*k*) Hal. Anal. c. 40; 1 Roll. Ab. 108.

(*l*) As to patronage, or the right of presentation to benefices, vide sup. p. 27.

[when a stranger that hath no right presenteth a clerk, and he is thereupon admitted and instituted (*m*); in which case of usurpation the patron lost by the common law not only his turn of presenting *pro hâc vice*, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, viz. a *writ of right of advowson* (*n*). The reason given for his losing the present turn, and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation], and consequent fulness or *plenarty* (as it was called) of the church by the act of the usurper, his own possession of the advowson was considered as displaced; and the law allowed no remedy, either by presentation or possessory action, to a person put out of possession of an hereditament of this description. [The only remedy therefore which the patron had left, was to try the mere right in a writ of *right of advowson;* which was a peculiar writ of right framed for this special purpose, but in every other respect corresponding with other writs of right (*o*): and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance (*p*).] Thus stood the common law.

[But bishops in antient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westminster the second, 13 Edw. I. c. 5, s. 2,] that

(*m*) Co. Litt. 277. As to admission and institution, vide sup. p. 29.

(*n*) 6 Rep. 49.

(*o*) F. N. B. 30. As to writs of right generally, vide sup. p. 480.

(*p*) F. N. B. 36.

if the possessory action of *quare impedit* (or another of the same class, called an assise of *darreign presentment* (q), and now abolished (r)) be brought within six months after the avoidance, the patron shall, notwithstanding such usurpation, recover that very presentation; which gives back to him the seisin of the advowson. [Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron to recover it, was driven to the long and hazardous process of a writ of right. To remedy which, it was further enacted by statute 7 Ann. c. 18 (s), that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present,] or maintain a *quare impedit*, [upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation,—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance.]

The above-mentioned remedy by *quare impedit* is [now the only action used in case of the disturbance of patronage;] and the course of proceeding in it will hereafter be considered at large in its proper place (t). At present we

(q) The assise of *darreign presentment* lay only where a man had an advowson by descent from his ancestors; but the writ of *quare impedit* is equally available whether a man claims title by descent or by purchase. (3 Bl. Com. 245.)

(r) By 3 & 4 Will. 4, c. 27, s. 36.

(s) As to this statute, see Robinson *v.* Marquis of Bristol, 20 L. J. (C. P.) 208.

(t) Vide post, bk. v. c. xi. By 4 & 5 Will. 4, c. 39, *costs* are given in this as in other actions, which was not formerly the practice.

shall only notice the circumstances by which it is usually preceded.

[Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months (*u*), otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient (*x*); unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*y*). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious;* and if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatûs*, he is bound to do it. A *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron (*z*); and if upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (*a*): which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as

(*u*) Vide sup. p. 72.

(*x*) Vide sup. p. 74.

(*y*) Hitching *v.* Glover, 1 Roll. Rep. 191.

(*z*) 1 Burn, 24.

(*a*) Ibid. 160. See Gorham *v.* Bishop of Exeter, 15 Q. B. 52.

[from a bishop to the archbishop; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters *may* go on in the mere ecclesiastical courts; but in contested presentations they seldom go so far: for upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his *quare impedit* for the temporal injury done to his property, in disturbing him in his presentation.] For the patron [is always plaintiff in this action, and not the clerk; as the law supposes the injury to be offered to the former only, by obstructing or refusing the admission of his nominee, and not to the latter, who hath no right in him till institution, and of course can suffer no injury.] But as to the parties *against* whom the action is to be brought, it is to be observed that all these three persons, the pseudo-patron, his clerk, and the ordinary, may be disturbers of a right of advowson: [the pretended patron by presenting to a church to which he has no right, and thereby making it litigious or disputable: the clerk by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary by refusing to admit the real patron's clerk, or admitting the clerk of the pretender.] And if the delay arises from the bishop alone, [as upon pretence of incapacity or the like, then he only is named as defendant; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and his clerk, leaving out the bishop, or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit (*b*); but if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the

(*b*) Lancaster *v.* Lowe, Cro. Jac. 93.

[writ shall abate (*c*); for the right of the patron is the principal question in the cause (*d*). If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reason it is the safer way to insert all three in the writ.]

Finally, we may remark, that though in a *quare impedit* the patron only, and not the clerk, is allowed to sue the disturber, yet by virtue of several acts of parliament (*e*), there is one species of presentation in respect of which a remedy, to be sought in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson; that is, the presentation to such benefices as belong to Roman Catholic patrons; which, according to their several counties, are vested and secured to the two universities of Cambridge and Oxford. [And particularly by the statute of 12 Ann. st. 2, c. 14, s. 4, a new method of proceeding is provided; viz., that besides the actions of *quare impedit*, which the universities as patrons are entitled to bring, they, or their clerks, may be at liberty to file a bill in equity against any person presenting to such livings and disturbing their right of patronage, or against his *cestui que trust*, or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts for the benefit of Papists, in evasion of those laws, whereby this right of advowson is vested in these learned bodies: and also (by the stat. 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bonâ fide* to a Protestant purchaser for the benefit of Protestants, and for a full consideration; without which requisities every

(*c*) Elvis *v.* Archbishop of York, Hob. 392.

(*d*) 7 Rep. 25.

(*e*) St. 3 Jac. 1, c. 5; 1 W. & M. c. 26; 12 Ann. st. 2, c. 14; 11 Geo. 2, c. 17.

[such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose; but in no instance but this does the temporal law permit the clerk himself to interfere in recovering a presentation, of which he is afterwards to have the advantage.]

III. We are next to consider the injuries that may be offered to the right of *property in things personal;* and this first, as regards things in *possession;* next, things in *action* (*f*).

First, the rights of personal property in *possession*, are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into several branches: [the unlawful taking them away; the unlawful detaining them, though the original taking might be lawful;] and such tortious acts as subject the owner to the loss of them, though the wrong-doer himself may be guilty neither of caption nor detainer. Our present subject will therefore involve four several heads:—1, the injury of unlawfully taking chattels from the owner; 2, that of unlawfully detaining them from him; 3, that of depriving him of them by other unlawful means; 4, that of doing damage to them.

1. And, first, of an unlawful *taking*. The nature of this requires no illustration, and our attention therefore is to be chiefly directed to its remedy. The first remedy that we shall notice is [the restitution of the goods themselves, with damages for the loss sustained by such unjust invasion; which is effected by action of *replevin*, an institution which the Mirror (*g*) ascribes to Glanvil, chief justice to King Henry the second.] This action is seldom resorted to but in one instance of an unlawful taking,—viz. [that of a wrongful

(*f*) As to this distinction, vide sup. vol. II. p. 11. (*g*) C. 2, s. 6.

[distress (*h*).] It is preceded by an application on the part of the owner, to the proper authority, to cause the goods to be *replevied* (*i*); that is, redelivered to the owner, upon his giving such security, as the law requires, for trying the legality of the distress. This application used formerly to be made to the sheriff, or his deputy, in the common law county court incident to his jurisdiction (*k*); but by the Acts establishing the new county courts (*l*), it is now to be made to the Registrar of one of *those* courts, viz., that within the district of which the distress was taken (*m*). The Registrar, on receiving this application, causes the goods to be accordingly replevied, on the owner's giving security, of such amount as mentioned in the Acts, to commence an action of replevin against the distreinor, in the county court, within one month from the date thereof; and to prosecute such action with effect and without delay; and to make return of the goods, if a return thereof shall be adjudged (*n*). The owner, (or replevisor,) is also entitled, however, at his option, to give security to commence such action in one of the superior courts (to be named), instead of the inferior jurisdiction; but in this case the security must be conditioned that he will do so within one week (instead of one month) from its date, and not only that he will prosecute with effect and without delay, and make return of the goods if a return shall be adjudged,—but also that, (unless he obtains judgment in such action by default,) he will prove before the superior court that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question; or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*o*). Security in one or other of these forms having been given, the replevisor

(*h*) Vide sup. p. 339.

(*i*) The word "replevy," (*replegiare*,) signifies taking back the *pledge*, that is, the goods distreined upon.

(*k*) Vide sup. p. 351.

(*l*) Vide ibid.

(*m*) 19 & 20 Vict. c. 108, ss. 63, 64.

(*n*) Ibid. s. 66.

(*o*) Ibid. s. 95.

proceeds accordingly to commence his action of replevin either in the county or superior court, as the case may be: but if he brings it in the former, it may be *removed*, by the defendant, (or distreinor,) into any superior court by writ of *certiorari*,—if he applies to the superior court or a judge for such writ, and gives security, (not exceeding £150,) to defend such action with effect, and (unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein)—to prove before the superior court that he, the defendant, had good ground for believing to the effect already set forth, in the case of an action brought in the superior court by the replevisor (*p*). And so much, for the present, with respect to the action of replevin:—the subsequent progress of which in a superior court, (and that in the county court is strictly analogous (*q*),) will be explained hereafter, when we shall have occasion to describe the proceedings in a suit at law (*r*).

(*p*) 19 & 20 Vict. c. 108, s. 67.

(*q*) See "Rules and Orders of 8th December, 1856," Rules 180, 181.

(*r*) Vide post, c. XI. It has been thought undesirable to encumber the text with any statement of the law of replevin by the act of the sheriff, as it existed before the new County Court Acts. But the following notices of it may be useful.

By the old common law, the only remedy for the party wishing to replevy his goods was by a writ of *replegiari facias*, issuing out of Chancery, and commanding the sheriff to deliver them to such party, and afterwards to do justice in the matter in his own county court. Afterwards, by the Statute of Marlbridge, 52 Hen. 3, c. 21; Statute of Westminster, 13 Edw. 1, c. 2; and 1 Ph. & M. c. 12—the sheriff was directed, for the more speedy relief of the party, to replevy without writ, upon plaint being levied in his said court by the owner of the goods, and on the finding by him of *plegii de prosequendo*, and also of *plegii de retorno habendo* in the event of the right being determined against him; besides which it was, in later times, directed by 11 Geo. 2, c. 19, that the sheriff, granting a replevin on a distress for *rent*, should take from the replevisor a bond, with two sureties, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond was to be assigned to the distreinor on request made; and, if forfeited, to be sued upon by the assignee. The plaint then proceeded in the common law county court, and might be prosecuted there to the end, whatever might be the value of the distress; but either party might remove it to one of the superior courts of law by

Another action for the unlawful taking of a man's goods, and one of much more extensive use, being applied to every injury of that description, is the action of trespass (*s*). [As if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury; which, though it doth not amount to felony, unless it be done *animo furandi*, is nevertheless a transgression, for which an action of trespass will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it.] Or the party [may at his choice have another remedy in damages, by action of trover and conversion, of which more will presently be said.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, although the original taking was lawful. As if I distrein another's cattle damage feasant, and before they are impounded he tenders me sufficient amends; now though the original taking was lawful,

writ of *recordari*; and also, if in the course of the proceeding any right of freehold came in question, the sheriff could proceed no further whether the plaint had been removed or not;—so that it was usual to carry it up in the first instance to the courts of Westminster-hall, to be there determined in the shape of an action of replevin.

It might happen that the distreinor claimed a property in the goods taken. If he did, the party distreined upon might sue out a writ *de proprietate probanda*; in which the sheriff was to try, by an inquest, in whom the property, previous to the distress, subsisted, before any replevin of the goods was made. It might also happen that the distress was carried out of the county, or concealed. In this case the sheriff might return to a writ of *replegiari facias*, that the goods were *eloigned* (*elongata*) to places to him unknown; and thereupon the party distreined upon, was to have a writ of *capias in withernam, in vetito* (or, more properly, *repetito*) *namio*; by which the sheriff was commanded to take a second or reciprocal distress, in lieu of the first which was eloigned; so that there was thus distress against distress, one being taken to answer the other, by way of *reprisal*, which seems to be the meaning of the old word *withernam*. And for this reason it was held, that goods taken in *withernam* could not be replevied, until the original distress was forthcoming. (For a fuller exposition of the law on these points, see 3 Bl. Com. p. 147—150.)

(*s*) This action, in other applications of it, has already been considered, vide sup. p. 487.

[my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of replevin against me to recover them (t); in which he shall recover damages for the *detention*, and not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action of *detinue* (u):] in which [the judgment is conditional that the plaintiff recover the goods; or (if they cannot be had) their respective values, and also damages for detaining them.] Formerly the defendant, on this judgment, had always his option of re-delivering the goods or their value; but now, where the value is assessed in the verdict (x), application may be made by the plaintiff to the court or a judge, for a special writ of execution, by which he will be enabled to seize the goods, or to distrain the property of the defendant, till a return be made (y). But as one object in the action of detinue is to obtain (if possible) specific restitution, so it [cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked.] This form of action was also formerly subject, (as were some other of our legal remedies,) to the incident of *wager of law* (*vadiatio legis*),—a proceeding which consisted in the defendant's discharging himself from the claim, on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true (z). This relic of a very antient and general institution, which we find established not only among the

(t) F. N. B. 69.

(u) Ibid. 138. As to this action, see Jones v. Dowle, 9 Mee. & W. 19; Hand v. Daniels, 1 L. M. & P. 430; Williams v. Archer, 5 C. B. 318.

(x) See Chilton v. Carrington, 15 C. B. 730.

(y) 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 78. Before this provision, recourse for this purpose had to be made to a court of equity. (See Pusey v. Pusey, 1 Vern. 273.)

(z) 3 Bl. Com. 341.

Saxons (*a*) and Normans (*b*), but among almost all the Northern nations that broke in upon the Roman empire (*c*), continued to subsist among us even till the last reign, when it was at length abolished by 3 & 4 Will. IV. c. 42, s. 13 (*d*): and as it exposed plaintiffs in detinue to great disadvantage, it had long had the effect of throwing that action almost entirely out of use, and introducing in its stead the action of trover: which still continues to be the favourite remedy in a case of unlawful detention of goods.

This action of *trover and conversion* is a species of trespass upon the case; and originally lay only for recovery of damages against such person as had *found* another's goods and wrongfully *converted* them to his own use; from which finding and converting, it derived its name. [The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods (*e*), gave it so considerable an advantage over the action of detinue, that (by a fiction of law,) actions of trover were at length permitted to be brought against any man, who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded.] The fiction consisting in alleging, as a matter of form, (for no proof of it was required,) that the plaintiff lost the goods, and that the defendant found them,—so as to bring the case within the proper scope of an action of

(*a*) 3 Bl. Com. 343.

(*b*) Gr. Coustumier, c. xxvi.

(*c*) 3 Bl. Com. 342, where it is observed, that its origin may be traced as far back as the Mosaical law: "If a man deliver unto his "neighbour an ass, or an ox, or a "sheep, or any beast to keep; and "it die, or be hurt, or driven away, "no man seeing it: then shall an "oath of the Lord be between them "both that he hath not put his "hand unto his neighbour's goods: "and the owner of it shall accept "thereof, and he shall not make it "good."—Exod. xxii. 10.

(*d*) An instance of it occurred in the practice of our courts as lately as in 1824. (King *v.* Williams, 2 Barn. & Cress. 538.). But in modern times such an occurrence had been extremely rare.

(*e*) Hartford *v.* Jones, Salk. 654.

trover; although in fact the goods might never have been lost, and might have come to the defendant's possession in some other way, and not by finding. And these formal allegations were retained up to the present times; but by a provision in 15 & 16 Vict. c. 76, (The Common Law Procedure Act, 1852,) they are for the future to be omitted: so that nothing more needs now to be alleged in the declaration, than that the defendant wrongfully converted the goods to his own use; or that he wrongfully deprived the plaintiff of the use and possession of his goods (*h*). And proof of this will be sufficient to sustain the action. Indeed, it will be sufficient to prove merely that the goods belonged to the plaintiff, and came to the defendant's possession, and that he refused or neglected, upon request, to deliver them up; for a refusal to deliver them on request, is, in itself, [*primâ facie* sufficient evidence of a conversion (*i*).] Under such circumstances, then, and supposing no lawful title to detain them to be shown by the defendant, the plaintiff will be entitled to judgment; and [shall recover damages equal to the value of the thing converted, but not the thing itself,] no specific claim of which is made in this form of action (*k*). It is further to be observed, with respect to the remedy of trover, that resort to it is frequently had not only in the case where goods are wrongfully detained upon a lawful taking, but where they have been unlawfully taken as well as detained. For though trespass, as we have seen, is the proper form where the action is

(*h*) See 15 & 16 Vict. c. 76, s. 49, et vide in Sched. (B.) 28. Notwithstanding this alteration, the action still retains its name of *trover.*

(*i*) 10 Rep. 56. See Green *v.* Dunn, 3 Camp. 215, (n.); Philpott *v.* Kelley, 3 A. & E. 106; Canot *v.* Hughes, 2 Bing. N. C. 448; Granger *v.* Hill, 5 Scott, 561; Caunce *v.* Spanton, 7 Man. & G. 903; Rushworth *v.* Taylor, 3 Q. B. 699; Heald *v.* Carey, 11 C. B. 977.

(*k*) It would seem, however, that the provision in 17 & 18 Vict. c. 125, s. 78, (mentioned sup. p. 514,) is available. The words of the Act are "in any action for the detention "of any chattel:" which may be held to apply in some sense to trover; though the judgment is for damages only, and not for the chattel itself.

founded on a wrongful caption, yet if the owner chooses to waive that ground of complaint, and to treat the case as one of wrongful detention only, he is at liberty to do so, and by this means enable himself to maintain an action of trover; which, for particular reasons of a technical kind, is sometimes found to be a more convenient form than trespass.

3. The injury of dispossessing or depriving a man altogether of personal chattels, may be effected (as already observed) by other unlawful means besides those of wrongful caption or detainer; and there are various torts,—or in other words, various acts of unlawful commission or omission,—which, though widely differing from each other in their specific nature, are nevertheless reducible under this common head. Thus, I may be deprived either of goods or money, by delivering the goods, or giving credit for the money, to one person, in consequence of a representation made by another, as to the circumstances or character of the former; such representation being untrue, and untrue to the knowledge of the person by whom it was made; and for this injury (*l*), (and for any other occasioned by a fraudulent misrepresentation (*m*),) an action may be maintained of trespass on the case. But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation was made *bonâ fide;* however absolute and unqualified the terms in which it was expressed (*n*). And by stat. 9 Geo. IV. c. 14, s. 6, no action shall be brought to charge any person by reason of any representation concerning the character, ability or dealings of another, to the intent that such other person may obtain credit, money

(*l*) See Foster *v.* Charles, 6 Bing. 396; S. C. 7 Bing. 105; Corbett *v.* Brown, 8 Bing. 35; Polhill *v.* Walter, 3 B. & Ad. 114.

(*m*) See Pewtriss *v.* Austen, 6 Taunt. 522; Humphrys *v.* Pratt, 5 Bligh, N. S. 154; Taylor *v.* Ashton, 11 Mee. & W. 401.

(*n*) See Haycraft *v.* Creasy, 2 East, 92; Smout *v.* Ilbery, 10 Mee. & W. 1; Ormrod *v.* Huth, 14 Mee. & W. 651; Collins *v.* Evans (in error), 5 Q. B. 820.

or goods, unless such representation be made in *writing*, signed by the party to be charged therewith (*o*). So, I may be deprived of money to which I am entitled under the judgment of a court of law, in consequence of the wrongful omission of the sheriff to seize the goods or person of the defendant, under the writ of execution which I have sued out upon it; or from his wrongfully permitting the defendant, after his being arrested by virtue of my writ of execution, to escape from custody. And in these instances the remedy is by action on the case against the sheriff (*p*).

4. Besides the deprivation of the possession of personal property, its owner may be injured by its *abuse and damage:* [as by hunting his deer; shooting his dogs; poisoning his cattle; or in anywise taking from the value of any of his chattels, or making them in a worse condition than before,] by any of those modes of negligent or wilful mischief which are too obvious to require a more particular detail. And as personal property may, in some instances, be of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—so there are injuries relating to these matters which properly fall under the present head, such as the piracy of a literary composition, or the infringement of a patent (*q*). Of a similar description, too, is the injury committed by one manufacturer who sells goods

(*o*) As to cases within this statute, see Haslock *v.* Fergusson, 7 Ad. & El. 86; Swan *v.* Phillips, 8 Ad. & El. 457; S. C. 1 W. W. & H. 374; Pilmore *v.* Hood, 5 Bing. N. C. 97; Devaux *v.* Steinkeller, 6 Bing. N.C. 84; Lyde *v.* Barnard, 1 Mee. & W. 101; Tatton *v.* Wade, 18 C. B. 371.

(*p*) See Williams *v.* Mostyn, 4 Mee. & W. 145; Guest *v.* Elwes, 5 Ad. & El. 118. Formerly (by the statute of Westminster 2, 13 Edw. 1, c. 1) the sheriff in the action for an escape was liable for the whole debt and costs of the original action; but by 5 & 6 Vict. c. 98, s. 31, his liability is now confined to the damages actually sustained by the execution creditor, in respect of the escape. Besides this action, the sheriff suffering an escape is liable to an attachment. See Reg. *v.* Leicestershire (Sheriff of), 1 L. M. & P. 414; Arden *v.* Goodacre, 11 C. B. 367.

(*q*) As to *copyright*, vide sup. vol. II. p. 34, et seq.; as to *patent right*, ibid. p. 25, et seq.

under the mark of another; even though the latter should have obtained no patent; this being an invasion of his exclusive right to sell in his own name (*r*). All such torts, by way of abuse or damage of personal chattels, are redressed either by trespass,—where the act is in itself immediately injurious; or by trespass on the case,—where it is injurious rather in a consequential than a direct sense; according to a distinction that has been referred to in a former place (*s*). But such of these injuries as relate to intangible chattels, are always remediable in the latter form of action only, and are not the proper subjects of an action of trespass. In the case of an infringement of copyright or patent right, or the like, it may also be right to remark in this place, that redress is very frequently sought, not only by an action to recover damages for the injury already suffered, but also by obtaining an *injunction* either from a court of equity or a court of common law; to restrain the wrongdoer from the further invasion of the right, and compel him to account for the profits already derived from the wrongful sale (*t*).

Hitherto of injuries affecting the right of things personal in *possession*. [We are now to consider, secondly, those which regard things in *action* only; or such rights as are founded in and arise from *contracts*;] the nature and several divisions of which were explained in the preceding volume (*u*).

(*r*) See Sykes *v.* Sykes, 3 Barn. & Cress. 541; Blofield *v.* Payne, 4 B. & Ad. 410; Rodgers *v.* Nowill, 17 L. J. (C. B.) 52.

(*s*) Vide sup. pp. 450, 451.

(*t*) As to injunctions against infringement of copyright or patent right in a court of equity, see Hill *v.* Thompson, 3 Meriv. 622; Collard *v.* Alison, 4 Myl. & C. 487; Southey *v.* Sherwood, 2 Meriv. 440; Barfield *v.* Nicholson, 2 Sim. & Stu. 1; Bailey *v.* Taylor, 1 Russ. & Mylne, 73. As to injunctions for this purpose, granted by a court of common law, see Holland *v.* Fox, 2 W. R. (C. B.) 858; Gittins *v.* Symes, 15 C. B. 362. The power of the common law courts in this respect is of recent creation, and founded on 17 & 18 Vict. c. 125, ss. 79—82; vide sup. p. 457; see also 15 & 16 Vict. c. 83, s. 42.

(*u*) Vide sup. vol. II. pp. 53—142.

Contracts, as we have there seen, are subject to the several distinctions of being either under seal, or by parol; verbal or written; express or implied: and they also comprise many individual species, the principal of which we had formerly occasion to consider in detail (*v*). Their violation, in any instance, constitutes that general description of injury known by the name of *breach of contract:* and in general the remedy, where the contract is under seal, is by action of debt or covenant; when it is not under seal, by debt, or by an action on promises, (action of *assumpsit* (*x*),) and this, whether such parol or unsealed contract be written or verbal, express or implied: as to which, however, it is to be understood, that in every case the competency of the several actions above specified, depends not merely upon the nature of the contract,—as being under seal or not,—but also upon the nature of the claim, as amounting to a *debt* or not, according to a distinction before laid down when treating of actions in general (*y*); but that the case is, on the other hand, often such as to give the plaintiff his election between one form of action and another. It may be here expedient, however, to advert in detail to some particular contracts,—consisting principally of those which, from their superior frequency or importance, have attracted our specific notice in former parts of the work. The remedies in these particular cases, may be stated as follows:—

1. As regards the breach of *covenants in leases* (*z*),—for example, the covenant to repair on the part of the tenant, or that for quiet enjoyment on the part of the landlord,—the remedy for either party is by action of covenant; which is also the proper form in case of the breach of any of these *covenants relating to title* (*a*) that are ordinarily contained in

(*v*) Vide sup. vol. II. pp. 53—56, 67—140.

(*x*) As to the action of assumpsit, vide sup. p. 449, n. (*a*).

(*y*) Vide sup. p. 449.

(*z*) Vide sup. vol. I. p. 517.

(*a*) Vide sup. vol. I. p. 492.

conveyances of real estate. But in case of a covenant in a lease to *pay rent*, the breach of it may be redressed either by action of covenant or of debt; for in this case the landlord, having a claim to a liquidated sum of money, there arises between him and the tenant a debt in point of law (*b*); which debt he may demand if he thinks proper, in lieu of the more general claim for damages in respect of the breach of covenant. [For a freehold rent indeed, reserved on a lease for life, &c., no action of debt lay, by the common law, during the continuance of the freehold out of which it issued ;] the proper remedy in that case having been by actions real: and it seems that to this day, no rent of inheritance is recoverable by an action of debt (*c*); but by the statutes 8 Ann. c. 14, and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents reserved on lease for life (*d*). Also debt will not lie for arrears of a rent-charge, or an annuity, granted in fee, in tail, or for life, during the continuance of such estate (*e*); but the proper remedy is by covenant; or by another action, that has now fallen into disuse, called an action of annuity (*f*). On the other hand, where rent falls into arrear under a parol contract, no action of covenant can be maintained, (that form being exclusively applicable to sealed contracts,)—but debt will lie; and by the statute 11 Geo. II. c. 19, s. 14, the plaintiff may also resort, (though he could not by the common law (*g*),) to the action of assumpsit just mentioned.

2. Under a contract of *sale* of goods (*h*),—if the vendee complains of a non-delivery of the article sold, a breach of

(*b*) Vide sup. vol. II. p. 140.

(*c*) Webb *v.* Jigs, 4 Mau. & Sel. 113.

(*d*) Vide 3 Bl. C. p. 232. These statutes are referred to by Blackstone as if they applied to rents of inheritance also; but they are confined to rents reserved on lease for life. As to the remedies for the executors of tenants in fee simple or fee tail, for arrears in his lifetime, see 23 Hen. 8, c. 37, s. 1.

(*e*) Kelly *v.* Clubbe, 3 Brod. & Bing. 130; Bac. Abr. Annuity and Rentcharge.

(*f*) Bac. Ab. ubi sup.

(*g*) See Brett *v.* Read, Cro. Car. 343; 1 Roll. Abr. 7, l. 23; Naish *v.* Tatlock, 1 H. Bl. 323.

(*h*) Vide sup. vol. II. p. 67.

warranty, or the like,—his remedy, where the contract was by parol only, (as is usually the case,) and not by deed, is by the action of assumpsit; and if the vendor complains of non-payment of the price—there being in this case a *debt* between the parties—the remedy is by debt or assumpsit, at the option of the plaintiff. And if the action be brought for breach of contract to deliver specific goods for a price in money, then, by the effect of a very recent enactment (*i*), the plaintiff may apply for and obtain leave from the judge before whom the cause is tried, that the jury shall, in finding that the plaintiff is entitled to recover, find also by their verdict what are the goods in respect of which the plaintiff is so entitled, and which remain undelivered; what sum the plaintiff would have been liable to pay for them; what damages the plaintiff would have sustained if the goods should ultimately be delivered by force of a writ of execution, and what damages, if not so delivered; and thereupon, in case of judgment for the plaintiff, the court or a judge may order execution to issue for the delivery of the goods, on payment by the plaintiff of the sum so payable by him, without giving the defendant the option of retaining the goods upon paying the damages assessed; and in default of delivery, the sheriff shall distrain the defendant by all his lands and chattels, until he deliver the goods, or (at the option of the plaintiff) cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof.

3. Where upon a contract of *bailment* (*k*), the bailor complains of a failure to redeliver the article, the defendant may in general be charged as on a tort, or, at the election of the plaintiff, as on a contract. In the former course of proceeding, the action may be detinue, or trover, or (according to the circumstances) an action on the case for negligence; in the latter, supposing the contract to be (as it usually is) by parol, the form of action is assumpsit.

(*i*) 19 & 20 Vict. c. 97, s. 2. (*k*) Vide sup. vol. II. p. 78.

4. Where upon a *loan of money* (*l*), the amount is not repaid according to the contract, and arrears exist either on account of principal or interest, the action for this injury, if the contract be under seal, is debt or covenant; if it be not under seal, then debt or assumpsit. And here we may take the opportunity of remarking, that there are in the nature of things, other pecuniary claims analogous to that for *money lent*, viz. the claim for *money paid* by the plaintiff for the defendant, at his request; for money *received* by the defendant, for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them (*m*). Indeed it is often difficult to determine, upon a given state of facts, into which of these claims the plaintiff's case properly resolves itself. Each of them, however, is the proper subject for an action of debt or assumpsit.

5. As to the contract of *partnership* (*n*), we may remark, that questions of account between partners, generally fall under the jurisdiction of a court of equity; and, (except in a form of action called *account*, which in modern times has very rarely come into use,) are not cognizable in a court of law (*o*). But an action at law may be brought by one partner against the other, on an express agreement to do or forbear from some particular act not involving any question of account (*p*); or to pay a liquidated balance or the like (*q*);—the remedy in such cases being debt or assumpsit, according to the nature of the case, and the distinctions formerly laid down in regard to those several

(*l*) Vide sup. vol. II. p. 87.

(*m*) See the statement of causes of action contained in schedule B. to the 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852). An action, as upon an *account stated*, lies only where the plaintiff and defendant have come to an account, and a balance has been acknowledged; though the simple acknowledgment that a particular sum is due will, without any *further* accounting, be sufficient.

(*n*) Vide sup. vol. II. p. 97.

(*o*) Holmes *v.* Higgins, 1 Barn. & Cress. 74; Arch. Pl. 36, 37.

(*p*) Bedford *v.* Button, 1 Bing. N. C. 391.

(*q*) Chit. Cont. 238; Smith *v.* Barrow, 2 T. R. 476.

forms of action. So, one partner cannot sue the other, at law, for taking a chattel of the partnership away into his own exclusive use; but if one of the partners has destroyed a chattel belonging to the firm, it seems that the other may maintain an action of trespass (*r*).

6. The breach of a contract of *guarantee* (*s*), if contained in an instrument under seal, is redressed by action of debt or covenant; if the contract be not under seal, then by action of debt or assumpsit. The remedy by the surety against the principal, where the former has been compelled to make a payment under the guarantee, is by debt or assumpsit, as for money paid by the former, to the use of the latter; and any one of several sureties, who has paid more than his rateable proportion, is entitled to claim contribution from the others, in the same forms of action.

7. Upon *bonds* (*t*), the remedy of the obligee, in case of breach of contract by the obligor, is by action of debt only, which is always brought as for the amount of the penalty; but according to the course of practice, as explained in a former part of the work (*u*), the plaintiff is allowed to recover no more upon a bond conditioned for the payment of money, than the principal sum due, with interest and costs; nor (generally) upon a bond conditioned for the performance of any other act, more than shall be assessed by way of damages. The action of debt is also the proper one in regard to all other contracts secured by penalties, if the plaintiff elects to proceed as for the penal sum; but the form of such contracts is in general such as to give him an option of claiming damages, without regard to the penal stipulation; and if the claim be made in this shape, the form of the action is covenant, or assumpsit, according to distinctions already explained.

8. For breach of contract on a *bill of exchange* or *pro-*

(*r*) Co. Litt. 200 a, b; B. N. P. 34; Arch. Pl. 36; vide Martyn *v.* Knowllys, 8 T. R. 145.

(*s*) Vide sup. vol. II. p. 103.

(*t*) Vide sup. vol. II. p. 106.

(*u*) Vide sup. vol. II. p. 108.

missory note (*x*), the remedy is by assumpsit; or, (where there was a privity of contract between the parties to the suit,) by debt also. Thus the payee, or any indorsee, of a bill or note, may maintain assumpsit against the maker, but only the payee may maintain debt against him. So assumpsit lies against the acceptor of a bill, at the suit of an indorsee, or of the payee, or of a drawer, who has been compelled to take it up; but debt will not lie against him at the suit of any of these parties, except the drawer (*y*).

9. Upon a *policy of marine* or *fire insurance* (*z*), the remedy of the assured, in case of breach of contract by the insurer, is by covenant, where the policy is under seal; by assumpsit where it is not. On a policy of *life* insurance under seal, the remedy is by debt or covenant; on one not under seal, debt or assumpsit.

10. And, lastly, upon *charter-parties* (*a*), the form of remedy, in case of breach of contract, is governed by the same distinction with respect to the nature of the instrument, as being sealed or unsealed. In the former case, if the action be brought by the charterer against the owner for not receiving, or properly stowing or delivering the cargo, the form is covenant; if by the owner against the charterer for not supplying a full cargo, it is also covenant; but if for non-payment of freight, it may be either covenant or debt, at the option of the plaintiff. On the other hand, where the charter-party is not under seal, assumpsit must be substituted for covenant in all the before-mentioned cases; and for non-payment of freight, the form of

(*x*) Vide sup. vol. II. p. 111.

(*y*) See Priddy *v.* Henbrey, 1 Barn. & Cress. 674; Cresswell *v.* Crisp, 2 Dowl. 635; Kinahan *v.* Palmer, 2 Jones, Ex. Rep. Ireland; Hatch *v.* Trayes, 11 Ad. & El. 702; Cloves *v.* Williams, 2 Bing. N. C. 868. *Debt* lies by indorsee against his immediate indorser, Stratton *v.* Hill, 3 Price, 253; Watkins *v.* Wake, 7 Mee. & W. 485. It was at one time doubted whether debt would lie in any case on a bill or note, unless expressed to be *for value received.* But it is now held, that the omission of these words is not material in that respect. Vide Chitty on Bills (6th ed.), p. 67.

(*z*) Vide sup. vol. II. p. 125.

(*a*) Vide sup. vol. II. p. 137.

action is assumpsit, or, at the option of the plaintiff, may be debt.

We have now sufficiently considered the injuries which affect such things in action as arise out of contracts: but there are some things in action which cannot properly be said to have that origin; and the withholding of which will nevertheless constitute a wrong or injury, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature: as when, in a court of law, judgment is obtained by one man against another, for a specific sum of money: or when by an act of parliament, of that class called penal statutes, a pecuniary forfeiture is inflicted for committing some specified offence; and such forfeiture is made recoverable, as it usually is, by the Crown, or the party aggrieved, or a common informer, as the case may be. This obligation or liability to pay a specific sum of money, constitutes (as will appear by former explanations (*b*)) a *debt*,—so that the party against whom the judgment is obtained, is immediately considered as owing to his adversary the amount awarded, and the party who transgresses the penal statute, as immediately owing to the Crown, the party aggrieved, or the common informer, as the case may be, the amount of the penalty (*c*). The remedy for the recovery of such debt, or chose in action, when withheld, is by action of debt on the judgment, or on the penal statute, respectively; and in the latter case, this remedy is generally designated as a penal

(*b*) Vide sup. vol. II. p. 140.

(*c*) Blackstone considers the debt, in such cases, as growing out of an implied contract, viz., the original contract entered into by all mankind who partake the benefits of society, to submit to the constitution of the state of which they are members. (3 Bl. Com. 160.) But though this seems correctly laid by him and other jurists as the foundation of the general obligation to obey the law, there is perhaps an unnecessary subtlety in supposing it the basis of the kind of debts in question. It is more natural to consider such debts, as not founded upon any contract at all;—though an implied contract to pay, may doubtless be engrafted upon *them*.

action; or, where one part of the forfeiture is given to the Crown, and the other part to the informer, a *popular* or *qui tam* action, because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur.*

IV. With regard to injuries which affect the rights of a man in his *private relations;* [and, in particular, such as may be done to persons under the four following relations, —husband and wife; parent and child; guardian and ward; master and servant.]

1. The injuries that may be offered to a man, considered as a *husband* (*d*), are principally three; [*abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating*, or otherwise abusing her.]

And, first, [*abduction* may be either by fraud and persuasion, or open violence; though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action of trespass, *de uxore raptâ et abductâ* (*e*). This action lay at the common law; and thereby the husband shall recover, not the possession of his wife (*f*), but damages for taking her away; and by statute Westminster the first, (3 Edw. I. c. 13,) the offender may also be imprisoned two years, and be fined at the pleasure of the Crown. Both the Crown and the husband may, therefore, have this action (*g*); and the husband is also entitled to recover damages, in an action on the case, against such as persuade and entice the wife to live separate from him without a sufficient cause (*h*). The old law was so strict on this point, that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being lost or drowned (*i*); but a stranger

(*d*) As to the relation of husband and wife, vide sup. vol. II. p. 250.

(*e*) F. N. B. 89.

(*f*) 2 Inst. 434.

(*g*) 4 Inst. 434.

(*h*) B. N. P. 78.

(*i*) Bro. Ab. tit. Trespass, 213.

[might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court, to sue for a divorce (*k*).]

Adultery is not punishable by our law as a crime; its penal correction being left to the Spiritual courts, which may proceed against the offender *pro salute animæ;* but considering it in another aspect, viz., as a grievous civil injury, the law, as it stood up to a very recent period, gave satisfaction for it to the husband, by an action for *criminal conversation,* in the form of trespass, or trespass on the case, at his election (*l*). In this action, the damages recovered [were usually very large and exemplary.] But they were properly increased and diminished by circumstances (*m*): [as the rank and fortune of the plaintiff and defendant; the relation or connection between them;] the degree and nature of the seduction employed; the previous behaviour and character of the wife; the manner in which she had been previously treated by the husband; [and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious.] The damages would also be mitigated where the husband was proved to have been himself first guilty of conjugal infidelity (*n*); and if it appeared, that he connived at or consented to his own dishonour, or lived, at the time of the adultery, in a state of absolute and permanent separation from his wife, the action would be wholly barred (*o*). It was also a point that deserves remark in reference to the law of this action, that it could not be maintained without proving a marriage in fact,—though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage (*p*). But

(*k*) Bro. Ab. tit. Trespass, 207, 440.

(*l*) Chamberlain *v.* Hazlewood, 5 Mee. & W. 515.

(*m*) B. N. P. 26.

(*n*) Bromley *v.* Wallace, 4 Esp. 237.

(*o*) See Bennett *v.* Allcott, 2 T. R. 168; Duberley *v.* Gunning, 4 T. R. 655, Weeding *v.* Timbrell, 5 T. R. 357; Chambers *v.* Caulfield, 6 East, 244.

(*p*) Morris *v.* Miller, Burr. 2057.

though it will still be useful to recollect how this law, until very recently, stood, the action itself is now abolished (*q*); and its place supplied by a different form of proceeding; it being provided by 20 & 21 Vict. c. 85, s. 33, that the injured husband may by a *petition* to the new Court for Divorce and Matrimonial Causes thereby established, claim damages from any person, on the ground of his having committed adultery with the wife of the petitioner. It is also provided that such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim of damages shall be heard and tried on the same principles and according to the same rules as formerly applied to actions for criminal conversation; and the damages shall be ascertained in all cases, (as before,) by the verdict of the jury. But the Act also introduces the new principle of giving power to the Court to direct, after the verdict has been given, in what manner the damages shall be paid or applied, and to direct that the whole or a part shall be settled for the benefit of the children, (if any,) of the marriage, or as a provision for the maintenance of the wife.

For the injury of *beating* a man's wife, or otherwise illusing her, [if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages by an action of trespass, which must be brought in the names of the husband and wife *jointly;* but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy, by an action of trespass (*r*), for this ill usage,] with an allegation, by way of special damage, that he has lost the benefit of her society, called an allegation

(*q*) 20 & 21 Vict. c. 85, s. 59.

(*r*) By 15 & 16 Vict. c. 76, s. 40, however, the husband may add claims in his own right, in an action brought in the joint names of himself and wife for injuries done to the latter.

per quod consortium amisit, [in which he shall recover a satisfaction in damages (*s*).]

2. With respect to the injury capable of being done to a man in the relation of *parent* (*t*), it seems to be now clearly established that there is no instance in which an injury can be sustained by a parent, in his merely parental character; and that in the case of a battery or other ill-treatment inflicted on a child, the action for redress, must in general be brought in the name of the child himself, whether he have attained to his full age or not (*u*). There are cases, indeed, in which the parent is entitled to sue in respect of misconduct towards the child; but as the right of suit attaches to him in all such instances, in the capacity of master, and not strictly in that of parent, the consideration of them will belong more properly to a subsequent head (*v*).

3. An injury may be done to a man, in the relation of *guardian*, by stealing or ravishing away his ward (*x*). For, [though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always (*y*), and is still, entitled to an action of ravishment,] in the form of trespass, [if his ward, or pupil, be taken from him; but then he must account to his pupil, for the damages which he so recovers (*z*).] But a more speedy and summary method of redressing all complaints relative to wards and guardians, [hath of late obtained, by an application to the Court of Chancery; which is the supreme guardian, and

(*s*) Guy *v.* Livesey, Cro. Jac. 501; Hyde *v.* Scyssor, ibid. 538. As to the case where, by negligence of the defendant, the plaintiff's wife is *killed*, see 9 & 10 Vict. c. 93, sup. p. 456.

(*t*) As to the relation of parent and child, vide sup. vol. II. p. 289.

(*u*) Hall *v.* Hollander, 4 Barn. & Cress. 660. This case may be considered as overruling the opinion to which Blackstone inclined, (see 3 Bl. Com. 141,) that an action may be maintained by a father for the abduction of his child, as well as by a husband for that of his wife.

(*v*) Vide post, pp. 531, 532.

(*x*) As to the relation of guardian and ward, vide sup. vol. II. p. 307.

(*y*) F. N. B. 139.

(*z*) Hale on F. N. B. 139.

[hath the superintendent jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24, that testamentary guardians may maintain an action of ravishment or trespass for recovery of any of their wards, and also for damages, to be applied to the use and benefit of the infants (*a*).

4. To the relation between *master and servant* (*b*), and the rights accruing therefrom, there are several species of injuries incident. One is retaining a man's hired servant before his time is expired: which, as it is an ungentlemanlike, so it is also an illegal act; for every master has, by his contract, purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servrnt, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by action on the case (*c*); and he may also have an action against the servant for non-performance of his agreement (*d*). But if the new master was not apprized of the former contract, no action lies against *him* (*e*), unless he refuses to restore the servant upon demand. Another point of injury] is that of [beating, confining, or disabling a man's servant,] so that he is not able to perform his work: [which depends upon the same principle as the last, viz. the property which the master has, by his contract, acquired in the labour of his servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself, as an individual, may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass,] or, at his election, trespass on the case (*f*); [in which he must allege and prove the

(*a*) Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 108.

(*b*) As to the relation of master and servant, vide sup. vol. II. p. 236.

(*c*) See Lumley *v.* Gye, 2 Ell. & Bl. 216.

(*d*) F. N. B. 167. See Keane *v.* Boycott, 2 H. Bl. 511; Gunter *v.* Astor, 4 Moore, 12.

(*e*) Ibid. Winch. 51.

(*f*) Chamberlain *v.* Hazlewood, 5 Mee. & W. 515.

[special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*g*); and then the jury will make him a proportionable pecuniary satisfaction (*h*).] It is in this manner, and in this alone, that by our law a parent is enabled to claim redress for a battery, or other ill usage, inflicted on his child; or even for the seduction of his daughter;—viz. as a master, and in an action of trespass (or on the case), *per quod servitium amisit*; and, therefore, unless he is able to prove that his child was in his service at the time the injury was committed, he is without remedy (*i*); from which it follows that he is without remedy when the child resided, at the time, with another master, though that master may himself maintain an action (*k*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him, as much as possible, from any difficulty connected with proof of the loss of service; considering the action as brought *in substance* to repair the outrage done to parental feeling,—and hold, therefore, that in such an action, the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*l*). Upon the same principle, too, the jury is directed, in assessing the damages, to take into account the dishonour done to the plaintiff, as well as the loss of service (*m*); though, on the other hand, they are also bound to pay attention to all such circumstances connected with the behaviour of any of the parties, as tend to lessen the merits of the plaintiff's case. It is further to be remarked, with respect to an action for

(*g*) 9 Rep. 113; 10 Rep. 130.

(*h*) Blackstone remarks that a similar practice prevailed at Athens; where masters were entitled to an action against such as beat or ill-treated their servants; and he cites Potter's Antiq. l. i. c. 26.

(*i*) See Hall *v.* Hollander, 4 Barn. & Cress. 660; Blamire *v.* Hayley, 6 Mee. & W. 55; Grinnell *v.* Wells, 7 Man. & G. 1033; Eager *v.* Grimwood, 1 Exch. 61; Davies *v.* Williams, 10 Q. B. 725; Griffiths *v.* Teetgen, 15 C. B. 344.

(*k*) Irving *v.* Dearman, 11 East, 24.

(*l*) See Jones *v.* Brown, 1 Esp. 217; Maunder *v.* Venn, Moo. & M. 323; Torrence *v.* Gibbens, 5 Q. B. 297.

(*m*) Stark. Ev. part iv. p. 1309.

seduction, that none can be maintained, in any case, by the daughter herself—for *volenti non fit injuria.*

Such then is the state of the law, (briefly considered,) with respect to injuries resulting from the violation of rights in private relations,—as to which it may be observed in general, that [notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior, by such injuries, is totally unregarded. One reason for which may be this—that the inferior hath no kind of property in the company, care, or assistance, of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing, during her coverture (*n*). The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture (*o*).] And so [the servant, whose master is disabled, does not thereby lose his maintenance or wages.] He has no interest in his master personally considered. [If he receives his part of the stipulated contract, he suffers no injury; and is therefore entitled to no action for any

(*n*) Vide sup. vol. II. p. 274.

(*o*) Blackstone remarks (3 Bl. Com. 142), that the wife or child had nevertheless, if the husband or parent were slain, a peculiar species of *criminal* prosecution allowed them, in the nature of a civil satisfaction, and called an *appeal.* This proceeding, though long since antiquated, was still in force when Blackstone wrote; and was strangely revived in our own days, in the case of Ashford v. Thornton, 1 Barn. & Ad. 405. It was soon afterwards, however, abolished by statute 59 Geo. 3, c. 46. It may be proper also to remark, in reference to the position in the text that the loss of the inferior, arising from an injury to the superior, is disregarded,—that by a recent alteration in the law, this antient principle is in some degree set aside; for by 9 & 10 Vict. c. 93, the executor or administrator of a party deceased, may now bring an action for such injury as shall have caused his *death;* and such action shall be for the benefit of the wife or child, as well as of the husband or parent, of the deceased, as the case may be. Vide sup. p. 456.

[battery or imprisonment which such master may happen to endure.]

V. The only injuries that remain to be noticed are those sustained by a man in respect of his *public* rights. This subject, however, will not detain us long, for injuries of this description, between subject and subject, are in general of such a nature as to be remediable, not so much by action as by indictment; or by some of the prerogative writs, to which we shall have occasion to advert in a subsequent chapter. Yet there are various instances, in which an action may be maintained in respect of the violation of public rights: as where a special damage is sustained by an individual, in consequence of the obstruction of a highway (*p*); or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right;—in both which instances the remedy is by action on the case. In the latter of them great difficulty was originally felt in entertaining the action; it being urged on the other side, that the offence was a parliamentary one, and not properly cognizable out of parliament; and also that it involved no private injury that the law could notice: yet it was ultimately adjudged (*q*), that an action lay in this case, at common law, for that the law gave a remedy for every injury, and that by this act of the returning officer, the plaintiff was deprived of the greatest privilege of a subject; viz. that of consenting to the laws by which he is bound: and that the concurrent jurisdiction of parliament in the matter, created no difficulty; particularly as the very grievance which was the subject of complaint, was that the plaintiff was not properly represented there. A somewhat similar description of injury has been since provided for, by a positive enactment of the legis-

(*p*) Wilkes *v.* Hungerford Market, 2 Bing. N. C. 281.

(*q*) Ashby *v.* White, Ld. Raym. 938. See Pryce *v.* Belcher, 3 C. B. 58; 4 C. B. 866.

lature; for by 11 & 12 Vict. c. 98, s. 103, "if any sheriff "or other returning officer shall wilfully delay, neglect, or "refuse, duly to return any person who ought to be re- "turned to serve in parliament, such person may, in case "it has been determined by a select committee that such "person was entitled to have been returned, sue the sheriff "or officer in any of her Majesty's courts of record at "Westminster or Dublin, or in the Court of Session in "Scotland; and recover double the damages he shall sus- "tain by reason thereof, together with full costs of suit; "provided such action is commenced within one year after "the commission of the wrongful act, or within six months "after the conclusion of any proceedings in the House of "Commons relative to such election."

CHAPTER IX.

OF THE LIMITATION OF ACTIONS.



We have now considered the various injuries between one subject of the realm and another, of which the courts of common law take notice; and the general nature of the remedies provided in these courts, by way of action. When any of these injuries have been committed, it follows that a right of action has arisen; but after ascertaining this, there still remains another point for consideration before an action can be safely brought, viz. how long the right of action has existed,—there being established by certain statutes called the *Statutes of Limitation*,—with respect to almost all actions and other legal proceedings,—a certain period, after which the remedy is barred by the mere effect of lapse of time.

[The use of these Statutes of Limitation, is to preserve the peace of the kingdom; and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for an injury committed, at any distance of time. Upon both these accounts the law therefore holds, that *interest reipublicæ, ut sit finis litium*; and upon the same principle, the Athenian laws in general prohibited all actions, where the injury was committed five years before the complaint was made.] Nor are these the only reasons on which the bar by lapse of time is founded; for if the plaintiff were permitted to bring a claim forward at any period, however remote, there would be danger of its being delayed until the defendant had, by some casualty, been deprived of the documentary or other evidence by

which it might once have been successfully encountered; and the delay might even be practised with the fraudulent design of exposing him to this disadvantage: besides which, it is to be considered, that great hardship always attaches to the case of a party, who, after a long possession,—not originating in any fraud or other misconduct of his own,—finds himself unexpectedly liable to eviction; while, on the other hand, a supine claimant is entitled to no favour or protection from the law: the maxim being, that *vigilantibus, non dormientibus, jura subveniunt.*

The course of legislation upon the subject under consideration, has been such as to lead naturally to its division into two branches; the one consisting of those provisions which relate to actions brought for recovery of things real; the other, of those which relate to actions brought with any different object.

I. And, first, with respect to actions, brought for recovery of land or other things real.

It was in reference to real actions, while still the only forms of remedy for recovery of the realty, that the law of limitations was first established. And, originally, such actions were limited from some particular event, or fixed era. Thus, by the antient law in the time of Henry the second, the demandant, in a writ of right, could not claim upon any seisin earlier than the reign of Henry the first (*a*); nor, by the Statute of Merton, (20 Hen. III. c. 8,) earlier than the reign of Henry the second; nor by Statute of Westminster the first, (3 Edw. I. c. 39,) earlier than that of Richard the first. And the same kind of limitation, though from more recent dates, was, by the same statutes, from time to time appointed for many other kinds of real action. But these dates were allowed afterwards to continue so long unaltered, that in process of time they became, in effect, no limitation at all; which gave rise at

(*a*) Com. Dig. Temps (G).

length to the Statute of Limitation, 32 Hen. VIII. c. 2: which took a different course, by limiting real actions not from any fixed date or event, but according to a fixed interval of antecedent time; and provided, that where, in any writ of right or any action possessory, the demandant claimed upon his own seisin, it must be a seisin within thirty years back; where on the seisin of his ancestor (*d*), it must (in a writ of right) be a seisin within sixty, or (in a possessory action) within fifty years (*e*). And afterwards, by 21 Jac. I. c. 16, it was enacted, that all writs of formedon should be brought within twenty years after the cause of action first fallen; and also that no person should make *entry* into any lands or hereditaments, but within twenty years after his right should first accrue; from which last enactment it followed, that the same period of twenty years also became the limitation, (as it still is,) in every action of ejectment, [for no ejectment can be brought unless where the plaintiff is entitled to enter on the lands.]

And thus stood the doctrine of limitation in general, so far as relates to the recovery of real property, during the whole of the long period that elapsed from the reign of Henry the eighth to that of William the fourth; upon which branch of the law, however, as it stood during that period, it may be proper, for the further information of the student, to make some additional remarks. First, then, it may be observed, that there originally existed no provision that was applicable to *claims by the Crown;* for the maxim formerly was, that *nullum tempus occurrit regi*, and the statute of Henry the eighth was not so framed

(*d*) As to formedon in the descender, see Rimington *v.* Cannon, 22 L. J. (C. P.) 153.

(*e*) 3 Bl. Com. 189, (n.) This statute extended to *rents, suits, and services*, as well as other hereditaments, but only to those which were customary or prescriptive, and not to those created by deed, or reserved on a particular estate. (3 Bl. Com. 189.) Nor did it extend to services of a casual kind, such as by possibility might not become due within the period of limitation,—such as fealty. Com. Dig. Temps (G), 9.

as to bind the Crown's rights. [By the statute indeed, of 21 Jac. I. c. 2, a time of limitation was extended to the case of the sovereign, viz. sixty years precedent to 19th February, 1623 (*f*);] but this of course became ultimately ineffectual by reason of the gradual efflux of time. It was however at length provided, by 9 Geo. III. c. 16, that in suits relating to land, the Crown should be bound by the lapse of sixty years; by which latter statute the law relating to this subject is still governed (*g*). Secondly, we may remark, that even up to the reign of William the fourth there existed [no limitation with regard to the time within which any actions touching *advowsons* were to be brought, at least none later than the times of Richard the first and Henry the third; for by the statute 1 Mar. st. 2, c. 5 (*h*), the Statute of Limitations, 32 Hen. VIII. c. 2, was declared not to extend to any writ of right of advowson, *quare impedit*, or assize of darreign presentment or *jure patronatus* (*i*).] And this because [it may very easily happen, that the title to an advowson may not come in question, nor the right have an opportunity to be tried, within sixty years,—which was the longest period of limitation assigned by the statute of Henry the eighth. For Sir E. Coke tells us (*j*), that there was a parson of one of his churches that had been incumbent there for fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years (*k*). Had therefore the last of these incumbents been the clerk of an usurper,

(*f*) 3 Inst. 189.

(*g*) See also 21 Jac. 1, c. 14, making some regulations as to informations of intrusion, where the Crown has been out of possession twenty years. (See Doe *v.* Morris, 2 Scott, 276.) See as to 9 Geo. 3, c. 16, Goodtitle *d.* Parker *v.* Baldwin, 11 East, 493.

(*h*) Et vide 7 Ann. c. 18, allowing *quare impedit*, &c. to be brought upon any prior presentation, however distant.

(*i*) 3 Bl. Com. 350.

(*j*) 1 Inst. 115.

(*k*) Two successive incumbents of the rectory of Chelmsford *cum* Farnborough, in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

[or been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shown a clear title and seisin by presentation and admission of the prior incumbent.] But though, for these reasons, it was deemed improper to introduce a limitation with respect to this species of property, founded merely on the lapse of time, yet it occurred to Blackstone, in treating of this subject, to remark, that it might be expedient to introduce one compounded of the length of time and the number of avoidances together; a suggestion that we shall presently find to have been since carried into effect.

The state of the law of limitation above described, having fallen under the consideration of the Commissioners appointed in the last reign, for revision of the law relative to real property in general, they took occasion in their Reports to recommend various improvements on this subject; which were afterwards embodied into the act of parliament, 3 & 4 Will. IV. c. 27 (*l*); and which were founded on the general principle that twenty years is an allowance of time reasonably sufficient in every case, for the recovery of corporeal hereditaments,—provided the claimant labour under no disability to assert his pretensions. This statute, which now governs the law of limitation in all proceedings, (to which the Crown is not a party,) whether at law or in equity, for recovery of things real, or of money secured or charged on the realty, comprises a body of enactments too numerous and diversified to be capable of full detail in a work like the present. A selection shall be made of such as are of cardinal character (*m*).

(*l*) Among the cases which have been decided on the construction of this Act, are the following:—Grant *v.* Ellis, 9 Mee. & W. 113; Owen *v.* De Beauvoir, 16 Mee. & W. 547; S. C. (in error), 5 Exch. 166; Forsyth *v.* Bristowe, 9 Exch. 716; Manning *v.* Phelps, 10 Exch. 59; Humfrey *v.* Gery, 7 C. B. 567.

(*m*) Besides those noticed in the text, it may be here remarked that, by sect. 40, provisions of limitation are made in reference to the recovery of money secured by mortgage,

And here we may notice, at the outset, that part of the statute, to which we have more than once had occasion in the course of this volume to refer, viz. the abolition of real actions, (with the exception of the writ of right of dower, dower, and *quare impedit* (n),) so as to leave to parties deprived of land, no remedy, in general, but those of entry or ejectment. As in this class of actions, suitors were allowed to bring forward claims referable to periods so remote as thirty, fifty, or even sixty years, they could not have been retained without alteration, consistently with the principle on which, as above remarked, the Act is founded; and as they were open to additional objection from their dilatory character, and the technical difficulties with which they were surrounded, there appeared no doubt upon the whole as to the expediency of their extirpation.

But besides this measure, the statute contains a copious and elaborate development of the new system of limitation,—from which we shall extract the following provisions:—

1. That no person (o) shall, after the 31st December, 1833, make an entry or distress, or bring an action to recover any land (p) or rent (q), but within twenty years next after the time at which the right to make such entry or distress, or bring such action, shall first ac-

&c., and of legacies; by sect. 41, in reference to arrears of dower; by sect. 42, as to arrears of rent or interest; and by sect. 43, as to proceedings in *spiritual* courts.

(n) 3 & 4 Will. 4, c. 27, s. 36.

(o) "Person" is defined by 3 & 4 Will. 4, c. 27, s. 1, as extending, for the purposes of that Act, to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual.

(p) "Land" is defined, by the same section, to extend to all corporeal hereditaments, and also to tithes, (other than tithes belonging to a spiritual or eleemosynary corporation sole), whether freehold or copyhold. As to the limitation of actions to recover *tithes*, vide Ely v. Cash, 15 Mee. & W. 618.

(q) "Rent" is defined, by the same section, to extend to all heriots, services and suits, for which distress may be made; and to all annuities and periodical sums of money charged on land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.

crue (*r*), either to the person himself, or those through whom he claims (*s*), as the case may be (*t*). This is subject, however, to qualification in the case of persons under *disability;* it being provided that, if, at the time at which the right of any person shall first accrue, such person shall be under the disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then he, or the person claiming through him, may, though twenty years have expired, make the entry or distress, or bring the action, within ten years next after the person to whom the right accrued shall have ceased to be under any such disability, or die, whichever shall first happen (*u*); but that no such entry, distress, or action, shall be made or brought, in such case of disability, but within forty years next after the right accrues, although the person to whom it accrued may have remained under disability, the whole of the forty

(*r*) The statute (by sect. 3) defines with great care the time at which the right shall be considered as *first accruing*, in all the different cases that may arise, (see Doe *v.* Oxenham, 7 Mee. & W. 131; Doe *v.* Sumner, 14 Mee. & W. 39; Jones *v.* Jones, 16 Mee. & W. 699; Doe *d.* Palmer *v.* Eyre, 17 Q. B. 366; Jayne *v.* Hughes, 10 Exch. 430); and contains special provisions applicable to the case of estates *tail* (as to which, see Austen *v.* Llewyllen, 9 Exch. 276). As to the effect of this statute upon the former doctrine relative to adverse possession as applied to the subject of limitation, see Nepean *v.* Doe, 2 M. & W. 894; Culley *v.* Doe, 11 Ad. & E. 1008; Doe *d.* Lansdell *v.* Gower, 17 Q. B. 589.

(*s*) This is defined by 3 & 4 Will. 4, c. 27, s. 1, to mean any person by, through or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise; and also any person who was entitled to an estate or interest to which he, or some person through whom he claims, became entitled as lord by escheat.

(*t*) Sect. 2.

(*u*) Sect. 16. By 19 & 20 Vict. c. 97, s. 10, no person entitled to an action or suit, the period of limitation of which is fixed by 3 & 4 Will. 4, c. 27, ss. 40, 41, 42, shall be entitled to any further time for it by reason only of his being at the time when the cause of action or suit accrued "beyond seas." As to these sections, vide sup. p. 540, n. (*m*).

years, or although the said term of ten years above mentioned shall not have expired (*x*).

2. That after the same 31st December, 1833, no person claiming any land or rent in *equity*, shall bring any suit to recover the same, but within the same period during which, by virtue of the provisions of the act, he might have made an entry of distress, or brought an action for recovery thereof, if his estate had been legal, instead of equitable (*y*). This is subject, however, to the following provisions:—*First*, That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent,—shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration; and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him (*z*). *Secondly*, That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud,—shall be deemed to have first accrued at and not before the time when such fraud shall, or with reasonable diligence might, have been first known or discovered: but not so as to enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed (*a*). *Thirdly*, That nothing in the Act contained, shall interfere

(*x*) 3 & 4 Will. 4, c. 27, s. 17.
(*y*) Sect. 24.
(*z*) Sect. 25.
(*a*) Sect. 26.

II. With respect to actions not brought for recovery of things real.

1. A period of limitation with respect to most of these is fixed by 21 Jac. I. c. 16, s. 3 (*e*); which provides in substance, that all actions of trespass for injuries to the person, or to land, or to personal property, (except those to be presently mentioned); all actions of detinue, trover, replevin, or account; and all actions of trespass on the case (*f*), (except for verbal slander;) and of debt on simple contract, or for arrears of rent;—shall be limited to six years after the cause of action accrued; actions of trespass for assault, menace, battery, wounding and imprisonment, to four years; and actions on the case for verbal slander, to two years. But here also, as in the statute of William the fourth, exception is made in favour of persons labouring under *disability* (*g*). For, if any person *entitled to sue*, shall

present to or bestow an ecclesiastical benefice, extend to the case where a *bishop* claims as patron; but the act does not affect the right of any bishop to collate by reason of lapse. 6 & 7 Vict. c. 54, s. 3.

(*e*) As to time from which this statute begins to run in particular cases, see Collinge *v.* Heywood, 9 Ad. & El. 633; Rhodes *v.* Smethurst, 4 M. & W. 42; S. C. (in error), 6 M. & W. 351; Waters *v.* Earl of Thanet, 2 Q. B. 757; Howell *v.* Young, 5 B. & C. 259; Tobacco Pipe Makers' Company *v.* Loder, 20 L. J. (Q. B.) 414; Webster *v.* Kirk, 17 Q. B. 949.

(*f*) The statute 21 Jac. 1, c. 16, inserts after the mention of actions on the case, the following exception:—"Other than such accounts "as concern the trade of merchan-"dize between merchant and mer-"chant"—(as to which exception see Cottam *v.* Partridge, 4 Man. & Gr. 271). But 19 & 20 Vict. c. 97, s. 9, now makes the limitation of six years applicable to "all actions of account "or for not accounting, and suits "for such accounts as concern the "trade or merchandize between "merchant and merchant, their fac-"tors and servants;" and also provides, that "no claim in respect of a "matter which arose more than six "years before the commencement of "the action or suit, shall be en-"forcible by action or suit, by reason "only of some other matter or claim "comprised in the same account "having arisen within six years "next before the commencement of "such action or suit."

(*g*) See also sect. 4 of 21 Jac. 1, c. 16, as to the time allowed for bringing a new action after the defendant has been outlawed, or a judgment in favour of the plaintiff has been arrested or reversed.

at the time when the cause of action accrued, be an infant, or a feme covert, or be *non compos*,—it is provided by the statute now under consideration that such person shall be at liberty to sue within the same period after the removal of the disability, as is allowed to persons having no such impediment (*h*). And by 4 & 5 Ann. c. 16, s. 19, if any person *liable to be sued*, shall, at the time when the cause of action accrued be beyond the seas (*i*),—a similar extension of the time for bringing the action shall in that case also be permitted; a provision, however, which must be taken in connexion with the recent enactment of 19 & 20 Vict. c. 97, s. 11, viz. that where the cause of action lies against two or more joint debtors, the person entitled to sue shall not be entitled to any extension of time within which to commence and sue such action, against such of them as shall not be beyond seas when the cause of action accrued; and on the other hand, that he shall not be barred from suing the joint debtor or debtors, after his or their return, by reason only that judgment has been already recovered against one or more of the others (*k*).

The operation of the statute of 21 Jac. I. c. 16, with respect to actions upon *simple contract*, was at one time considerably weakened by the doctrine which prevailed, that not only a payment on account of principal or inte-

(*h*) See Le Veux *v.* Berkeley, 5 Q. B. 836; Townsend *v.* Deacon, 3 Exch. 706. The statute of 21 Jac. 1, c. 16, also makes exception in the case of other disabilities, viz., that of *imprisonment* of the party entitled to sue, and that of his being *beyond the seas*. But these are no longer disabilities under this statute; for, by 19 & 20 Vict. c. 97, s. 10, no person or persons shall be entitled to commence an action or suit at any time beyond the period fixed by 21 Jac. 1, c. 16, s. 3, by reason only of such person, or one or more of such persons, being beyond the seas, or imprisoned at the time when the cause of action or suit accrued.

(*i*) By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of Her Majesty, shall be deemed "beyond seas" within the meaning of 4 & 5 Ann. c. 16.

(*k*) As to the law on this point, before the statute mentioned in the text, see Towns *v.* Mead, 16 C. B. 123.

rest, but any mere verbal acknowledgment, made before action brought (*l*), that the debt was due,—would suffice to take the case *out of the statute* (according to the common phrase), by raising an implied *assumpsit* or promise to pay the debt: upon which promise, (as upon a new cause of action,) the same time for instituting a suit would be allowed, as upon the original contract. But the law on this subject has been since materially altered; for by 9 Geo. IV. c. 14, s. 1, it is enacted, that, in actions of debt or on the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the 21 Jac. I. c. 16, unless such acknowledgment or promise be contained in some writing (*m*), to be signed by the party to be chargeable thereby (*n*); and that where there are two or more joint contractors, no such joint contractor shall be chargeable, in respect only of the written acknowledgment of the other: and by 19 & 20 Vict. c. 97, s. 14, it is now provided, (in reference to the statute of James, and to the effect of a *payment* on account,) that where there are two or more co-contractors, or co-debtors, none of them shall lose the benefit of the limitation, by reason only of payment of any principal or interest by any of the others (*o*).

(*l*) Bateman *v.* Pindar, 3 Q. B. 574.

(*m*) As to what is a sufficient *writing*, to rebut the Statute of Limitations, see Spong *v.* Wright, 9 Mee. & W. 629; Cripps *v.* Davis, 12 Mee. & W. 159; Hart *v.* Prendergast, 14 Mee. & W. 741; Williams *v.* Griffith, 3 Exch. 335; Hyde *v.* Johnson, 2 Bing. N. C. 777; Waller *v.* Lacy, 1 Man. & Gr. 54; Bayley *v.* Ashton, 12 Ad. & El. 493; Gardner *v.* M'Mahon, 3 Q. B. 561; Willins *v.* Smith, 4 Ell. & Bl. 180; Evans, app., Simons, resp., 9 Exch. 282; Goate *v.* Goate, 1 H. & N. 29; Rackham *v.* Marriott, ibid. 234.

(*n*) By 19 & 20 Vict. c. 97, s. 13, a writing signed by *an agent duly authorized* will suffice.

(*o*) As to *payments* in particular cases, and their effect to take the case out of the statute, see Cleave *v.* Jones, 20 L. J. (Exch.) 238; Burn *v.* Boulton, 2 C. B. 476; Wainman *v.* Kynman, 1 Exch. 118; Bodger *v.* Arch, 10 Exch. 333; Walker *v.* Butler, 25 L. J. (Q. B.) 377; Turney *v.* Dodwell, 3 Ell. & Bl. 136.

2. The statute of 21 Jac. I. c. 16, was also in itself materially defective; for it made no provision for actions on bonds, indentures, or other instruments under seal; and consequently parties having claims on such instruments were at liberty to sue upon them in covenant or debt, at any period of time, however distant. And though, to prevent the injustice which such a state of the law would otherwise have occasioned, it became the practice on the trial of such actions, for the judge to recommend the jury, in cases where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the bond or other specialty had been satisfied; this method of proceeding was found not to be attended with the same advantage, or to adapt itself so correctly to the purposes of justice, as a law of direct limitation. Such limitation has been consequently now provided with respect to claims on instruments under seal, as well as some other cases not embraced by the statute of James; it being enacted by the 3 & 4 Will. IV. c. 42, s. 3 (*p*), that all actions of debt for rent, upon any indenture of demise, or of covenant or debt on any bond or other specialty, and all proceedings on recognizances,—shall be brought within twenty years after the cause of action or proceeding accrued; and all actions of debt upon an award, (where the submission is not under seal,) or for a copyhold fine, or for an escape, or money levied upon any writ of *fieri facias*,—within six years. Which enactment is subject to the same exception as that of the statute of James, with respect to any person who, when entitled to sue, is under *disability*,—as an infant, feme covert, or person *non compos* (*q*); and

(*p*) Among the cases decided on this statute, are the following:—Strachan *v.* Thomas, 12 Ad. & El. 536; Paget *v.* Foley, 2 Bing. N. C. 679: James *v.* Salter, 3 Bing. N. C. 544; Farrell *v.* Gleeson, 11 Cl. & Fin. 702; Sanders *v.* Coward, 13 M. & W. 65; 15 ib. 48; Doe *v.* Beckett, 4 Q. B. 601; Tuckey *v.* Hawkins, 4 C. B. 655; Kemp *v.* Gibbon, 12 Q. B. 662; The Cork and Bandon Railway Company *v.* Goode, 13 C. B. 826.

(*q*) Under this section, absence

also to a proviso, that if any acknowledgment in writing be signed by the party liable or his agent, or payment or satisfaction made in part, on account of any arrears of principal or interest, the person entitled to the action may bring the same within twenty years after such acknowledgment, payment or satisfaction (r). By 19 & 20 Vict. c. 97, s. 14, however, the same provision is made in reference to this statute as in reference to that of James, viz. that where there are several co-contractors or co-debtors, none of them shall lose the benefit of the limitation, by reason only of payment of any principal or interest by any of the others.

3. By statute 31 Eliz. c. 5, all suits and indictments (s) upon any *penal statutes* (t), made or to be made, where any forfeiture is to the Crown alone, shall be sued within two years from the commission of the offence; where the forfeiture is to a common informer alone, within one year (u); where to the Crown and a common informer jointly, then by the common informer within one year, and by the Crown within two years after that year is expired. But this statute did not extend to penal actions at suit of the party grieved; and therefore by 3 & 4 Will. IV. c. 42, s. 3, before cited, it is required that these shall be brought within two years after the offence shall have been com-

"beyond seas" of the party entitled to sue, was also a disability; but its character in this respect has now been abolished by 19 & 20 Vict. c. 97, s. 10.

(r) 3 & 4 Will. 4, c. 42, s. 5; Forsyth v. Bristow, 8 Exch. 716. See also sect. 6 of this statute as to the case where defendant has been outlawed, or judgment in favour of the plaintiff has been arrested or reversed.

(s) This statute extended also to all *informations* upon any penal statutes; but so much of it as "relates to the time limited for exhibiting an information for a forfeiture upon any penal statute" is now repealed by 11 & 12 Vict. c. 43, s. 36, which Act also provides (sect. 11), that all informations for offences punishable on summary conviction shall be laid within six calendar months from the time when the matter arose, unless the time for the information has been otherwise specially limited. See Re Edmondson, 17 Q. B. 67.

(t) As to these, vide sup. p. 526.

(u) Chance v. Adams, 1 Ld. Raym. 78.

mitted, unless the particular statute which creates the forfeiture shall have expressly enacted otherwise.

4. By 11 & 12 Vict. c. 44, s. 8, it is provided, that no action shall be brought against any justice of the peace for anything done in the execution of his office, unless commenced within six calendar months after the act committed (v).

5. Lastly, by 5 & 6 Vict. c. 97, s. 5, it is enacted, that from the passing of that act the period within which actions may be brought for any thing done under the authority, or in pursuance of, any *local or personal act of parliament* shall be two years; or in case of continuing damage, then within one year after such damage shall have ceased.

And thus much of the law of limitation—whether as regards the remedies for recovery of the realty, or those which have a different object. Between which the following distinction is observable,—that, as regards the former, the statute 3 & 4 Will. IV. c. 27, has, by its express provision (x), the effect of extinguishing the *right*, as well as barring the *remedy;* but, as regards the latter, the limitation bars the remedy only. So that though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of it after that period, through the medium of any lien that I may hold on the property of the debtor (y).

We may also remark (in conclusion), with respect to actions the limitation of which is fixed by 21 Jac. I. c. 16, or 3 & 4 Will. IV. c. 42, that, though periods are limited within which the action shall in different cases be com-

(v) Sect. 34.

(x) There are similar provisions with respect to many other public officers acting in execution of their duties, though the period of limitation varies in the different cases. See 24 Geo. 2, c. 44, s. 8; 3 Geo. 4, c. 126, s. 147; 7 & 8 Geo. 4, c. 31, ss. 3, 12; 5 & 6 Will. 4, c. 50, s. 109; c. 76, s. 133; 8 & 9 Vict. c. 118, s. 165; 9 & 10 Vict. c. 95, s. 138; 11 & 12 Vict. c. 63, s. 139.

(y) Higgins v. Scott, 2 B. & Ad. 413.

mençed, yet in favour of vigilant plaintiffs, the law provides a method of constantly keeping the right of action alive notwithstanding any lapse of time, (or, as it is commonly expressed, *saving* the Statute of Limitation); viz. by suing out a writ of summons, and getting it renewed every six months, that is, impressed by the proper officer of the court with a seal bearing the date of such renewal. For by the 15 & 16 Vict. c. 76, s. 11, such writ so renewed from time to time, will suffice continually to prevent the operation of the Statute of Limitation, though nothing further be done in the mean time in the action.

CHAPTER X.

OF THE PROCEEDINGS IN AN ACTION.



HAVING under the head of redress by suit in courts examined in the preceding pages, first, the nature and several species of courts of justice, wherein remedies are administered for all sorts of civil injuries (*a*), we proceeded next to investigate the nature of the injuries themselves, and the remedies provided for them; and in the first instance turned our attention to that very large and important class of injuries which are cognizable in the courts of common law, and the remedy which those courts afford in different cases by action (*b*);—to complete our view of which, we are now to consider the manner in which that remedy by action is pursued and applied, and the course of proceedings which it involves. But as some of these proceedings are of a nature that, according to the ordinary practice of the courts, can be transacted only during the particular periods of the year called *Terms*, it will be convenient to advert shortly to those forensic seasons, before we enter on the main business of the chapter.

[The Terms are supposed by Mr. Selden (*c*) to have been instituted by William the Conqueror; but Sir H. Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the Church, being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural

(*a*) Vide sup. pp. 362—443. cc. III. IV. V. VI.

(*b*) Vide sup. pp. 444—552; bk. v.

(*c*) Jan. Ang. l. 2, s. 9.

[business. Throughout all Christendom in very early times, the whole year was one continual Term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike: till at length the Church interposed, and exempted certain holy seasons from being profaned by the tumult of forensic litigations; as particularly the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the haytime and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition; which was established by a canon of the Church, A.D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code (*e*).

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law Terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor (*f*), that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays, till Monday morning, the peace of God and of holy Church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that, though the author of the Mirror (*g*) mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express (*h*) that in the reign of

(*e*) Spelman, Of the Terms.

(*f*) C. 3, De Temporibus et Diebus Pacis.

(*g*) C. 3, s. 8.

(*h*) C. 53.

[King Edward the first, no secular pleas could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, (of which many are preserved in Rymer's *Fœdera* (*i*),) that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by the statute of Westminster the first, (3 Edw. c. 51,) which declares that, "by the assent of all the prelates, "*assize of novel disseisin*, *mortancestor*, and *darreign present-* "*ment*, shall be taken in Advent, Septuagesima and Lent; "and that at the special request of the king to the bishops." The portions of time that were not included within these prohibited seasons fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael; which Terms have been since regulated and abbreviated by several acts of parliament (*k*).] Their present regulation depends on the statute 11 Geo. IV. & 1 Will. IV. c. 70, amended by 1 Will. IV. c. 3.

At the time when the statute 11 Geo. IV. & 1 Will. IV. c. 70, was passed, Michaelmas Term began on the 6th November and ended on the 28th of the same month; Hilary Term began on the 23rd January, and ended on the 12th February, unless any of these four days happened to fall on a Sunday—for then the Term began or ended on the day following; Easter Term began on the Wednesday fortnight after Easter Sunday, and ended on the Monday three weeks afterwards; Trinity Term on the Friday after Trinity Sunday, and ended on the Wednesday fortnight after it began (*l*). Two of the Terms thus de-

(*i*) Temp. Hen. 3, *passim*.

(*k*) Prior to these Acts, Trinity Term, in particular, had been regulated by 32 Hen. 8, c. 21; Michaelmas Term, by 16 Car. 1, c. 6; and 24 Geo. 2, c. 48.

(*l*) Christian's Blackstone, vol. iii. p. 278.

pended on the *moveable* feasts of Easter and Trinity, which was attended with some inconvenience. But by this statute, and by the statute 1 Will. IV. c. 3, they are now fixed to certain periods; and all the four Terms are otherwise newly regulated; it being provided that Hilary Term shall begin on the 11th, and end on the 31st January; that Easter Term shall begin on the 15th April, and end on the 8th May; that Trinity Term shall begin on the 22nd May, and end on the 12th June; and that Michaelmas Term shall begin on the 2nd November, and end on the 25th. And it is further enacted (*m*), that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter Day, fall within Easter Term, there are to be no sittings in *banc* on any of such intervening days (*n*), but the Term shall be prolonged and continued for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of Easter day: and the commencement of the ensuing Trinity Term is in such case to be postponed, and its continuance prolonged for an equal number of days of business (*o*). And further (*p*), that in case the day of the month on which any Term is to *end* shall fall on a Sunday, then that Monday next after shall be deemed to be the last day of the Term. The case of the day of the month on which the Term is to *begin* falling on a Sunday, is not provided for by these acts. It has been decided, however, that, for the purpose of computation, the Sunday must in that case be considered as the first day of the Term; although, as the courts do not sit, no judicial act can be done, or supposed to be done, till the following Monday (*q*).

(*m*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 6.

(*n*) As to *sittings in banc*, vide sup. p. 415. By 1 Will. 4, c. 3, s. 3, such intervening days are nevertheless to be taken as a part of the Term, though there are no *sittings in banc* upon them.

(*o*) See Wright *v.* Lewis, 9 Dowl. 183; Donnes *v.* Bostock, ibid. 241.

(*p*) 1 Will. 4, c. 3, s. 3.

(*q*) See Doe *v.* Roe, 1 Dowl. 63; Arch. Pr. by Chitty, p. 127, 8th edit.

With respect to the kind of proceedings which are conducted exclusively in Term, we may remark, that in general all sittings in *banc* are of that character. But the sittings in the courts of *assize* and *nisi prius* (*r*) are held for the most part in Vacation; that is, during the intervals between the Terms: and (with the exception of a reasonable period of partial recess (*s*), viz. from 10th August to 24th October,) all proceedings taking place between the parties or their attornies, out of court, that is, not in the actual presence of the judges, may usually be transacted during the same intervals as well as in Term time (*t*); and by 17 & 18 Vict. c. 125, s. 95, the courts may now, (where they find it expedient for the despatch of business,) hold sittings in *banc*, or for trial of issues in fact, at any time either in Term or Vacation, not falling within the period of recess above mentioned. And so much with respect to Terms—the explanation of which seemed a necessary introduction to the proper subject of the chapter, viz. the proceedings in an action, to which we are now to invite the reader's attention.

[The most natural and perspicuous way of considering the proceedings in an action, will be to pursue the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide the sub-

(*r*) Vide sup. p. 415.

(*s*) Reg. Gen. H. T. 1853, (Pr.) r. 9. As to the *holidays* allowed in the common law courts and offices, see 3 & 4 Will. 4, c. 42, s. 43; Reg. Gen. H. T. 1853, (Pr.) r. 173.

(*t*) The practice on this subject was formerly very different. All writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intituled of some antecedent term; the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term: and a party obtaining a verdict in vacation, on the trial of any issue, or any inquisition of damages, had also to wait in every case until the term next following, before he could sign final judgment, or take out execution. (Second Report of the Common Law Commissioners appointed in 1828, p. 28.) It is within the last twenty-five years only that these inconveniences have ceased to exist.

[ject by any more logical analysis.] The regular therefore and orderly parts of a suit at law are these: I. The process; II. The pleadings; III. The trial and evidence; IV. The judgment; V. The proceedings in error (where the judgment is supposed to be erroneous); VI. The execution.

I. To begin then, with the *process*:—

The first object in an action is to procure the defendant's *appearance;* in order that he may have an opportunity of being informed of the plaintiff's demand or complaint, and of encountering it in such manner as he may think fit. The term *appearance*, (whether applied to plaintiff or defendant,) has reference to an antient state of practice, by which the litigant parties personally, or by their respective attornies, actually confronted each other in open court. But their appearance has for centuries past ceased to be an actual one; and as regards the plaintiff, no particular form is now used in substitution for it; but as regards the defendant, the form is observed of his delivering to the proper officer of the court, a memorandum importing either that he appears in person, or that some attorney, whose name is given, appears on his behalf—a practice that obviously secures the important object, of protecting defendants from the danger of having a judgment obtained against them by surprise. This appearance is previously commanded by a *writ*, (or mandate from the sovereign,) which is termed, in technical language, the *process* in the action.

The process in antient times comprised a variety of different writs, of different degrees of stringency, issued consecutively upon each other, where the first for any reason failed to be effectual (*u*). But it always began with an *original writ;* which was an instrument issued out of

(*u*) All these writs fell under the common term of the *process;* and those subsequent to the first or original writ were also called the *mesne process*, to distinguish them from the original writ, and also from writs of execution, which were termed *final process*.

Chancery, in the name of the sovereign, under the Great Seal, (instead of being merely under the seal of the court of common law itself, as was usual with other process,) commanding the sheriff to require the defendant to appear in the court of common law, to answer to some particular cause of action in the writ set forth. This mode of commencing a suit, which (as we shall see hereafter (*x*)) is not yet laid aside in the few *real* actions which still exist, was antiently in universal use, and is a practice of remote antiquity. We may also take occasion to remark here, that great technical importance was attached to a writ of this description. For as it had constituted, from time immemorial the first step in the suit, and always set forth, (in general or special terms according to the nature of the case,) the circumstances upon which the suit was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves; it being held that no action would lie unless the case was one for which a precedent could be found, in the *Register of Original Writs.* Thus the law of writs, (that is, of original writs,) became in effect identical with that of actions, and the same remedy was described indifferently as a *writ* of trespass, (for example,) or of dower,—or an *action* of trespass, or of dower. In course of time, however, new modes of commencement were devised, by connivance of the judges, in order to avoid the expense of an original writ, (for which a fine or fee, of considerable amount, was in many cases payable to the Crown); and with the view also of enabling the Courts of Queen's Bench and Exchequer to effect that encroachment or usurpation on the jurisdiction of the Common Pleas, to which we referred in a former part of this volume (*y*). We shall not encumber our text with any attempt to explain the nature of these devices, or the manner in which they severally operated, which are now become matters of mere curiosity (*z*). It will suffice to say that they had the effect of irregularly introducing, into

(*x*) Vide post, bk. v. c. XI.

(*y*) Vide sup. pp. 390, 394.

(*z*) Vide sup. pp. 390, n. (*n*); 394, n. (*h*).

each of the three courts, the use of a variety of writs of different descriptions by way of alternatives for the antient course of suing out an original writ under the Great Seal; and that the result of this was, at length, to involve the first stages of the suit in great and unnecessary complexity. The Commissioners appointed in 1828 for inquiry into the course of proceedings at common law, having been consequently led to recommend the adoption of a simple and more uniform system (*a*), an act of parliament was eventually passed for the purpose (*b*).

But this system, though unquestionably comprising many capital improvements, has latterly been thought to have been too moderate and cautious in its deviations from the antient course: and has therefore been itself amended (at the suggestion of a succeeding commission), by the 15 & 16 Vict. c. 76 (called the Common Law Procedure Act, 1852); and further amendments have now been recently made by 17 & 18 Vict. c. 125, (called the Common Law Procedure Act, 1854 (*c*)).

According to the method of proceeding established by these Acts (which in part retain, and in many important respects innovate upon, the antecedent practice (*d*)), all

(*a*) See First Com. Law Report of the Commisioners appointed in 1828.

(*b*) 2 Will. 4, c. 39.

(*c*) The provisions of these Acts apply in general, not only to the superior courts of the common law at Westminster, but to all courts of record in England or Wales, to which the Crown, by order in council, may, from time to time, think proper to apply the same. The Acts also apply in general to the Court of Common Pleas in the county palatine of Lancaster; and to the Court of Pleas in the county palatine of Durham. (See 15 & 16 Vict. c. 76, ss. 228, 229; 17 & 18 Vict. c. 125, ss. 100, 105.) (Sect. 229.)

(*d*) The practice of the superior courts of common law is now mainly governed by these acts, and by such General Rules as the courts have made thereon; viz. Reg. Gen. Hil. T. 1853; Mich. V. 1854; E. T. 1855, 1856, 1857. It also depends, however, in part, on former statutes, viz. 2 Will. 4, c. 39, 3 & 4 Will. 4. c. 67, and 1 & 2 Vict. c. 110; for where the provisions of any of these, have been neither repealed nor altered by the Common Law Procedure Acts, such provisions are still in force; and the practice also in part depends on the immemorial usage of the courts, upon points which none of these Acts or General Rules affect.

personal actions (*e*) are to be commenced by a writ of summons in a prescribed form (*f*),—viz., by a writ issued in the queen's name out of the court in which the action is brought, directed to the intended defendant, describing him as of the county and place where he is supposed to reside or be, and commanding him to cause an *appearance*, (a term already explained,) to be entered for him in that court, in an action at the suit of the plaintiff, within eight days after the writ shall be *served* (*g*) upon him, the defendant (*h*). It is also to be indorsed with the name and place of abode of the plaintiff's attorney, and, where he is agent for another attorney in the country, with the name and place of abode of the latter; or if no attorney is employed, then with a memorandum that it has been sued out by the plaintiff in person, mentioning particularly his place of residence (*i*). Moreover, if it be for payment of any debt, the amount of the debt and costs claimed is to be indorsed, with a notice that if the amount be paid to the plaintiff or his attorney within four days from the *service*, further proceedings will be stayed (*k*). And it is

(*e*) In the case of *ejectment*, which the Act does not seem to include under the term "personal action" (vide 15 & 16 Vict. c. 76, s. 169), a special writ of summons is provided, differing in some respects from the ordinary one mentioned in the text. (Vide Sched. A. of the same act.)

(*f*) The form is in 15 & 16 Vict. c. 76, sched. (A.)

(*g*) 15 & 16 Vict. c. 76, s. 2, sched. (A.)

(*h*) In the particular case of an action on a *bill of exchange* or *promissory note*, if commenced within six months after it has become payable, the plaintiff may by 18 & 19 Vict. c. 67, proceed *summarily*, in the manner described sup. vol. II. p. 116, n. (*q*); and the writ will in that case deviate from the ordinary form, and command the defendant to *obtain leave to appear*, and appear within twelve days after the service.

(*i*) 15 & 16 Vict. c. 76, s. 6.

(*k*) Ibid. sect. 8. The defendant is at liberty, however, notwithstanding such payment, to have the costs *taxed*; and if more than one-sixth is disallowed, the plaintiff's attorney will have to pay the costs of taxation. (Ibid.) With respect to all the indorsements here mentioned, it is to be observed that their omission does not render the writ *void*. It is only an irregularity rendering it liable to be set aside or amended. Ibid. sect. 20.

in the option also of the plaintiff, in any case where his claim is for a debt, or liquidated sum of money, and the defendant resides within the jurisdiction of the court, to make a *special* indorsement of the *particulars* of the claim, in such summary form as the Common Law Procedure Act, 1852, prescribes (*l*).

This writ remains in force for six calendar months; at any time before the expiration of which, supposing it not to have been yet served, it may be *renewed* (in order to keep the suit alive) for a similar period; and such renewal may be repeated as often as there may be occasion, all renewals being effected by the simple method of procuring a stamp to be impressed upon it by the proper officer (*m*). One or more *concurrent* writs may also be issued at any time within the first six months, and will remain in force to the end of that period, and are capable, like the primary one, of being renewed; these being in the same form with the primary one, except that they have the word "concurrent" impressed upon them by the proper officer (*n*),—and being intended for the convenience of the plaintiff, who, in the case of joint defendants residing in different places, or of a sole defendant whose residence is unknown, may wish to be supplied with several writs of the same tenor, with a

(*l*) See the form of such special indorsement, 15 & 16 Vict. c. 76, sched. (A.), No. 4. The cases in which this special indorsement may be made, are thus defined: "All cases where the plaintiff resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, as for instance a bill of exchange, promissory note or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, (whether under seal, or not,) where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque or note." 15 & 16 Vict. c. 76, s. 25. See Rogers *v.* Hunt, 10 Exch. 474; Rodway *v.* Lucas, ibid. 665.

(*m*) Ibid. sect. 11. (See Black *v.* Green, 15 C. B. 262.) The stamp should bear upon it the *date* of the renewal.

(*n*) Ibid. sect. 9. The stamp should bear upon it the *date* of issuing the concurrent writ.

view to contemporaneous service, or attempts at service, in different localities (*o*).

The writ, either primary or concurrent, (duly renewed, if renewal has become necessary,) must not only be served, but the service of it must, (where practicable,) be a *personal* one (*p*); that is, a copy of it must be left with the defendant in person, showing him at the same time the writ itself, if he so requires (*q*). But if personal service should be found impracticable, then the plaintiff is entitled to apply to the court out of which the writ issued, or to a judge, for an order that he should be at liberty to proceed as if personal service had been effected; which order, (subject to any condition that the circumstances may seem to require,) the court or judge is empowered accordingly to make, on being satisfied that reasonable efforts have been used to effect personal service, and either that the writ has come to the defendant's knowledge, or that he wilfully evades the service of the same, and has not appeared thereto (*r*).

Supposing personal service to be effected, and no appearance to be entered by the defendant pursuant to the exigency of the writ, or supposing an order dispensing with personal service to be obtained, then, in either case, if the writ has a special indorsement of particulars, (which it will be recollected can occur only in the case where the claim is for a debt, or liquidated sum of money,) the plaintiff is entitled to sign final judgment forthwith, as *for want*

(*o*) By 15 & 16 Vict. c. 76, s. 14, the writ of summons may be served in any county.

(*p*) Ibid. sect. 17.

(*q*) As to personal service, see Goggs *v.* Lord Huntingtower, 12 Mee. & W. 503; Christmas *v.* Eicke, 6 D. & L. 40. If the writ be issued against a corporation aggregate, it may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of the corporation. If against the inhabitants of a hundred or other like district, on the high constable or one of the high constables. If against the inhabitants of any franchise, liberty, city, town or place not being part of a hundred or other like district, on some peace officer thereof. Sect. 16. (See Walton *v.* Universal Salvage Company, 16 Mee. & W. 438.)

(*r*) Sect. 17.

of appearance (*s*). And this judgment may be for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, (if any,) to the date of the judgment; and with a regulated sum for costs; or if the plaintiff be not content with the regulated costs, then such amount of costs as the court shall tax in the particular case (*t*).

But where, on the other hand, upon personal service being effected, an appearance is duly entered pursuant to the writ, the plaintiff is, of course, not entiled to sign judgment: nor is he even allowed to do so where an order dispensing with personal service has been obtained, if the writ bears no special indorsement of particulars. In either of these cases his course is to deliver to the defendant, in case he have entered an appearance, or if he have not, to

(*s*) 15 & 16 Vict. c. 76, s. 27. Prior to this Act, it was an invariable rule in every personal action, that, until the defendant had *appeared*, no judgment in the action could in any case be awarded. But if he failed to appear after a personal service had been effected, the plaintiff might cause an appearance to be entered for him, (commonly known as an appearance *sec. stat.*); and where a personal service had proved impracticable, the plaintiff might obtain leave to take out a writ of *distringas* against his goods and chattels; and where the defendant had no goods capable of being seized, and was returned *non est inventus*, the plaintiff might resort to process of *outlawry* against him. If the defendant, after being duly *exacted* and *proclaimed* under this process became an *outlaw*, all property that he might have was forfeited and seized into the hands of the Crown; but the Court of Exchequer would make an order to apply it in satisfaction of the plaintiff's claim. As judgment may now be signed *for want of appearance*, process of outlawry in the case above described is no longer necessary; (see 15 & 16 Vict. c. 76, s. 24;) but this process is also competent to the plaintiff, where, *after* judgment, defendant is returned *non est inventus* to a writ of *capias ad satisfaciendum* issued against him: and in this case it is a process still in use.

(*t*) 15 & 16 Vict. c. 76, s. 27. (See as to *interest*, Rodway *v.* Lucas, 10 Exch. 665; and as to *costs*, Reg. Gen. Hil. T. 1853, r. 1.) Under such circumstances, however, the defendant may, even after final judgment has been signed, be let in to defend, upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits. 15 & 16 Vict. c. 76, s. 27.

file in court for his use (*u*), a *declaration*, that is, a written statement, according to a prescribed form, of the nature of the claim or complaint on which the action is founded; and as this is the first of a series of mutual allegations which the parties are allowed to interchange with the view to the development of the point in controversy between them, (which allegations are technically called *pleadings*,) we have thus arrived at the second stage of the suit.

We must revert, however, to the subject of process in order to observe that the account above given of it always supposes the defendant to reside within the jurisdiction of the court. When he resides out of it (*x*) there is some variation. The time for appearance in such case is regulated by the distance, from England, of the place where he resides; and the court or judge, upon being satisfied that there is a cause of action which arose within the jurisdiction (*y*), or in respect of a breach of a contract made within the jurisdiction, and that the writ was personally served, (or that reasonable efforts were made to do so,) and that it came to the defendant's knowledge, and that either he wilfully neglects to appear, or is living out of the jurisdiction in order to delay his creditors,—may direct from time to time that the plaintiff shall be at liberty to proceed in the action, in such manner, and subject to such conditions, as seem fit. In this case, too, no special indorsement of particulars is used; and though where the writ is for payment of any debt, it should be indorsed with the amount of the debt and costs claimed, in like manner as if the defendant resided within the jurisdiction; yet the time limited for payment should not be confined to four days, but, extended to the same period as is limited by the writ for appear-

(*u*) 15 & 16 Vict. c. 76, s. 28. The declaration and all the subsequent pleadings are in general *delivered* out of court, between the parties or their attornies; but where the defendant makes default in appearance, the declaration is not so delivered, but *filed* in the proper office of the court.

(*x*) The act of 15 & 16 Vict. c. 76, here adds the words, "in any place except in Scotland or Ireland." (Sect. 18.)

(*y*) See Forbes *v.* Smith, 10 Exch. 717; Green *v.* Braddyll, 1 H. & N. 69.

ance (z). The plaintiff also cannot in such case obtain judgment for want of appearance, without first giving proof, in such manner as the Act specifies, of the amount of the debt or damages sustained (a). In addition to which, it is to be observed, that, supposing the defendant to be not only resident abroad, but a foreigner, he is to be served with a notice explanatory of the proceedings, in such form as in the Act set forth (b).

It will also be proper to advert here to a collateral incident, which may occur in the case of a defendant resident within the jurisdiction, at the time that the writ issues, but suspected of an intention to abscond from the realm, in order to place his person and property out of reach, and consequently to render any judgment that may be ultimately obtained against him fruitless. Under such circumstances, if the plaintiff can show upon affidavit, to the satisfaction of a judge of one of the superior courts, that he has a cause of action against any defendant to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that such defendant is about to quit England, the judge will make an order that the defendant be held to bail for such sum (not exceeding the amount of the debt or damages), as shall appear expedient (c). This order may be made at any time between the commencement of the action and final judgment; and having obtained it, the

(z) 15 & 16 Vict. c. 76, s. 18, sched. (A.), No. 2.

(a) 15 & 16 Vict. c. 76, s. 18, sched. (A.), No. 2.

(b) Ibid. s. 19, sched. (A.), No. 3.

(c) 1 & 2 Vict. c. 110, s. 3. As to the affidavit required for obtaining such an order, see the following cases; Gibson *v.* Spalding, 11 Mee. & W. 173; Arkenheim *v.* Colegrave, 13 Mee. & W. 620; Daniels *v.* Fielding, 16 Mee. & W. 200; Graham *v.* Sandrienelli; Talbot *v.* Bulkeley, ibid. 191; Pontifex *v.* De Maltgoft, 17 L. J. (Ex.) 55; Hargreaves *v.* Hayes, 5 Ell. & Bl. 272. Such an order has been refused in a proceeding to revive a judgment. (Agassiz *v.* Palmer, 5 Man. & G. 697.) As to an application to set aside the order, see Pegler *v.* Hislop, 17 L. J. (Ex.) 53. Various provisions as to bail are made by Reg. Gen. Hil. T. 1853, (Pr.) r. 81—111, 130, 132, 134.

plaintiff is at liberty to sue out a writ of *capias ad respondendum*, directing the sheriff to arrest the defendant (*d*), who remains in custody on such arrest, until he shall have either given a bail bond to the sheriff, with reasonable sureties (*e*), or made a deposit of the amount for which the arrest was ordered, together with 10*l.* for costs (*f*). The object both of bail bond and deposit, is to afford security to the plaintiff, that afterwards, viz., within eight days inclusive from the arrest (*g*), the defendant shall put in bail to the action, that is, procure two responsible persons, (being either housekeepers or freeholders,) to enter into a recognizance, engaging that in the event of judgment being given against defendant he shall either pay the debt or damages and costs, or render himself to prison in satisfaction thereof, or that they will themselves make payment thereof on his behalf (*h*). But it is now time to return to the progress of the suit.

II. We resume, therefore, secondly, the consideration of the *pleadings*. By the Common Law Procedure Act, 1852, the same which has chiefly amended the course of the process, great alteration also has been introduced into the course of the pleadings (*i*); the object of the reform being

(*d*) As to the manner of an arrest, see Chitty's Burn, "Arrest."

(*e*) As to proceedings against the bail, vide Betts *v.* Smyth, 2 Q. B. 113; 17 & 18 Vict. c. 125, s. 90.

(*f*) 1 & 2 Vict. c. 110, s. 3—7. See Welchman *v.* Sturgis, 6 D. & L. 739.

(*g*) Lush, Pr. p. 538, 2nd ed.

(*h*) It is provided by 14 & 15 Vict. c. 52, in aid of the proceeding by *capias* above described, that the creditor may, even before any action is brought, apply to a commissioner in bankruptcy, or a judge of a county court, for a warrant to arrest; and that any arrest thereon shall be considered as an arrest under the *capias* to be subsequently issued. As to this statute (called The Absconding Debtors' Arrest Act), see Masters *v.* Johnson, 8 Exch. 63; Eld *v.* Vero, ibid. 655.

(*i*) From a period of very remote antiquity down to the time of passing of this Act, the pleadings were of a highly artificial character, and had been elaborated by the care of judges and practitioners during many successive centuries, into a regular system or science called *pleading*, or more popularly *special pleading*, which constituted a distinct branch of the law, with treatises and professors of

to establish a new or amended method built on the old foundations, but with an improved design as regards the objects of simplicity and despatch.

The general result contemplated by the present method, (entirely following in this respect the method which it supplanted,) is the development of the point in controversy between the parties, in order that if it should turn out to be matter of law, it may be referred to the decision of the judges of the court, or if matter of fact, to trial by jury, or such other method as the law may have provided for the trial of a question of that particular kind. When this result is attained, the parties are said to be *at issue*, (*ad exitum*,) or at the end of their pleading, and the emergent question itself is termed *the issue;* and, according to the nature of the case, may turn out to be either an *issue in law* or an *issue in fact.*

The manner in which the parties are thus brought to issue, remains also in substance the same as formerly, though in many respects simplified. A general idea of it may be obtained from the following explanations.

First, we may remark, that the pleadings or mutual allegations are always to consist of matter of *fact*, and of fact only—for all matters of *law* are judicially noticed by the court, and supposed to be known by the adverse party also, or to the pleader who conducts the altercation for him: and therefore the allegations on either side, of the facts respectively relied upon, will always suffice to develope the legal positions which apply to the case between

its own. It was a system highly rated by our antient lawyers, and had at least the merit of developing the point in controversy with the severest precision. But its strictness and subtlety were a frequent subject of complaint; and one object of the Common Law Procedure Act, 1852, was to relax and simplify its rules. Whether the effect of this will be to impair its value or not, in other respects, experience alone can decide. The system, however, may yet receive further improvement by such General Rules as the judges may hereafter make. As to their power in this respect, see 13 & 14 Vict. c. 16; 15 & 16 Vict. c. 76, s. 223; 17 & 18 Vict. c. 125, s. 97; 18 & 19 Vict. c. 26.

the parties, and the question or questions of law, (if any,) which are in dispute between them. It is also a rule of the same general nature, that in their allegation of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established; for matter of evidence, though essential for the consideration of the jury, by whom the issue or question of fact is to be tried, is superfluous so far as the object of pleading is concerned, —which is merely to ascertain whether the question is matter of fact or matter of law, and if the former, to develope it in a shape sufficiently precise to show its general nature and import—but not to determine on which side of the question the truth lies, that being the province, not of pleading, but of trial.

These principles being premised, we may proceed to a general examination of the nature and order of the pleadings themselves.

The first of these is the *declaration* (*narratio*). This, as well as every subsequent pleading, is to be *intituled* of the proper court, and of the day of the month and year when pleaded (*k*). At the commencement also of the declaration, and in the margin of it, is always to be inserted some county, called the *venue in the action;* the object of its insertion being to show in what county the plaintiff *lays the action;* that is, proposes to have the action tried, in the event of arrival at an issue in fact to be tried by jury. In local actions, the venue must be alleged according to the truth of the fact; in transitory ones (*l*), the plaintiff may lay the action in what county he pleases, subject to the right of the defendant to apply to have the venue *changed;* which alteration will in general be ordered (*m*) upon

(*k*) 15 & 16 Vict. c. 76, s. 54.

(*l*) As to local and transitory actions, vide sup. p. 451.

(*m*) No venue shall be changed without special order of the court or a judge, except by consent. (Reg. Gen. Hil. T. 1853, r. 18.) As to the application to change venue, &c., see De Rothschild *v.* Shilston, 8 Exch. 503; Begg *v.* Forbes, 13 C. B. 614.

affidavit that the cause of action arose wholly in some other county; though the plaintiff has, on the other hand, the opportunity of opposing such order, by showing that evidence material to the support of his case arose in the county where the venue is laid. The declaration then proceeds to allege, in short and precise terms, the circumstances of the plaintiff's complaint, so as to show him entitled to maintain his action; and concludes with an allegation of the amount of damages which he claims of the defendant (*n*).

After the plaintiff has delivered his declaration, it is the defendant's turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner. If the declaration be framed so as to prejudice, embarrass, or delay the fair trial of the action, he is entitled to apply to the court or a judge to have it struck out or amended. Or supposing no such objection to the frame of the declaration to arise, yet if the matter it contains, appear on the face of it substantially insufficient, in point of law, to entitle the plaintiff to the redress he claims, the defendant's course is to *demur;* that is, to deliver a written formula, called a *demurrer*, (from *demorari*,) importing that he denies the sufficiency, and will wait the judgment of the court whether he is bound to answer (*o*). If, on the other hand, the plaintiff's state-

(*n*) Examples of the manner in which some of the more ordinary causes of action should be stated in the declaration, are given in 15 & 16 Vict. c. 76, sched. (B.) It is to be observed that where the declaration is for a debt or liquidated demand, and no "special indorsement" was upon the writ of summons, the practice requires that there should be delivered collaterally with the declaration, and at the same time with it, the *particulars of the plaintiff's demand*, containing a more detailed account of the nature and amount of his claim. (Reg. Gen. Hil. T. 1853, (Pr.) rr. 19, 20.) But where there has been a special indorsement of particulars on the writ of summons, no other particulars than those so indorsed are required. (15 & 16 Vict. c. 76, s. 25.)

(*o*) A demurrer must be in the form prescribed by 15 & 16 Vict. c. 76, s. 89. It was formerly either *general* or *special*, that is, it either objected in general terms only, or set forth a particular objection.

ment appears *ex facie* sufficient in point of law, the defendant's course is to *plead*; that is, to deliver a *plea*; the general object of which, is to make answer in point of *fact* to the declaration. If he neither demurs nor pleads within the time allowed by the practice of the court for that purpose, the plaintiff will be entitled to sign judgment against him as for *default of plea* (p).

The plea may be either *dilatory* or *peremptory*. Dilatory pleas, (which by statute 4 Ann. c. 16, cannot be received unless supported by affidavit of their truth (q),) are founded on some matter of fact not connected with the merits of the case, but such as may exist without impeaching the right of action itself; and are either pleas *to the jurisdiction*, showing that by reason of some matter therein stated, the case is not within the jurisdiction of the court; or pleas of *suspension*, showing some matter of temporary incapacity to proceed with the suit; or pleas *in abatement*, showing some matter for *abating* or quashing the declaration. The effect of such a dilatory plea is, that, if successful, it defeats the particular action, leaving the plaintiff at liberty to commence another in a better form, if the case should be such as to admit of an amendment of that description (r). On the other hand, peremptory pleas, (more usually called pleas *in bar*,) are founded on some matter

And by 27 Eliz. c. 5, and 4 Ann. c. 16, it was provided, that all objections of mere form were to be raised in the shape of special, and not of general, demurrer. But now by 15 & 16 Vict. c. 76, s. 51, no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

(p) As to judgment in default of plea, see Lush, Pr. p. 317, 2nd edit.

(q) This affidavit may be waived by the plaintiff. Graham *v.* Ingleby, 4 Exch. 651.

(r) Pleas of *misnomer* of the plaintiff or defendant, and of *nonjoinder* of a necessary party as defendant, were till lately among the most frequent instances of dilatory pleas; but the temptation to a vexatious use of them is now much diminished by the effect of certain enactments. See as to the former, 3 & 4 Will. 4, c. 42, s. 11; as to the latter, sect. 8 of the same statute; and 15 & 16 Vict. c. 76, ss. 38, 39. As to the plea in abatement of the nonjoinder of a party as *plaintiff*, see ibid. sect. 36 and Reg. Gen. Hil. T. 1853, r. 6.

tending to impeach the right of action itself; and their effect consequently is to defeat the plaintiff's claim altogether.

Pleas in bar are subject also to various divisions. For, first, they comprise the class of *general issues*, which are denials of the whole matter in the declaration, or at least of the principal fact upon which it is founded,—as (in trespass, or trespass on the case,) that the defendant is *not guilty* (*s*); (in debt on bond or other deed), that *it is not his deed;* (in debt on simple contract), that he *never was indebted as alleged;* (in assumpsit), that he *did not promise as alleged;*—while all other pleas in bar are distinguished from the general issues, by the term of *special pleas*. Again, pleas in bar are distinguished from each other, according to their subject matter, as pleas in *justification* or *excuse*, and pleas *in discharge*. A plea in justification or excuse, is one that tends to show that there was *never* any right of action; as where in trespass for assault and battery, the defendant pleads *son assault demesne*, viz. that it was the plaintiff's own original assault; or in an action on the case for slander, that the words, alleged to have been spoken of the plaintiff, are true. But pleas in discharge are those which show that the cause of action, though once existing, has been barred by matter subsequent; as by payment, or release, or accord and satisfaction, or by a statute of limitation, or a *set-off* (*t*); which last occurs where the plaintiff sues for a debt, and the defendant alleges a reciprocal debt due to him from the plaintiff, and claims to have it allowed by way of discharge from the action, either wholly or in part, as the case may be (*u*).

(*s*) As to the plea of Not Guilty by *statute*, see Edwards *v.* Hodges, 15 C. B. 477.

(*t*) This plea of set-off answers very nearly to the *compensatio* or *stoppage* of the civil law. (Ff. 16, 2, 1.) It was not allowed at the common law, but is given by 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24. As to particulars of set-off see Reg. Gen. Hil. T. 1853, r. 19.

(*u*) Examples of the proper manner of pleading different pleas are given in the 15 & 16 Vict. c. 76, sched. (B.); where may be found most of the general issues, and the most ordinary pleas and replications.

With respect to all pleas in bar, however, it is a fundamental rule, that they must either *traverse* (*x*) (that is, deny) the matter of fact in the declaration, or *confess and avoid* it; that is, admitting it to be true, show some new matter of fact tending to obviate or take off its legal effect (*y*). Thus, the general issue of *not guilty*, in an action of trespass for assault and battery, denies the act of violence alleged; while, on the other hand, the plea of *son assault demesne*, in the same action, confesses that act, but *avoids* it by showing circumstances of excuse or justification. So in an action of debt, or assumpsit, for goods sold and delivered, the general issue of *never indebted* traverses the sale and delivery; a plea of payment confesses both, but *avoids* them by showing matter of discharge. And a plea that does not conform to this rule, will in general be either insufficient in substance, so as to entitle the defendant to *demur*, or at least will be embarrassing in its form, so as to entitle him to apply to have it struck out or amended. Yet to this rule there are some exceptions. Thus the defendant in an action for a debt or liquidated demand, may

(*x*) It is provided by 15 & 16 Vict. c. 76, ss. 76—79, "that a defendant "may either traverse generally such "of the facts contained in the decla-"ration as might have been denied "by any one plea; or may select and "traverse separately any material "allegation in the declaration, al-"though it might have been in-"cluded in a general traverse." Also, "that a plaintiff shall be at "liberty to traverse the whole of "any plea or subsequent pleading "of the defendant by a general de-"nial, or, admitting some part or "parts thereof, to deny all the rest; "or to deny any one or more alle-"gations." Also, "that a defendant "shall be at liberty in like manner "to deny the whole or part of a re-"plication or subsequent pleading "of the plaintiff."

(*y*) It will be proper to notice here, that by a recent alteration of a very remarkable kind, as calling on the *Common law* courts to take notice of the doctrines of *Equity*, it is provided, that in any cause in which, if judgment were obtained against the defendant, he would be entitled upon *equitable* grounds to relief, he may plead the facts, which entitle him to such relief, by way of defence; and such plea shall begin with the words, "For defence on equitable grounds," or words to the like effect (17 & 18 Vict. c. 125, s. 83). This enactment however is qualified by a proviso, enabling the court, under circumstances, to strike out such plea; as to which vide post, p. 575, n. (*f*).

avail himself of a plea of *tender* (a); that is, he may plead that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into court, ready to be paid to him;—or he may, in most actions, resort to a plea of *payment of money into court;* viz. that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (b);—or in any action, he may have occasion to plead by way of *estoppel* (c); as that the plaintiff ought not to be permitted to make a particular allegation, because he has formerly done some solemn act, (as by deed under his hand and seal,) involving an assertion to the contrary. As to all which pleas, it is evident that they are in the nature of exceptions to the general rule above stated. For in the two first, (admitting, as they do, the right of action,) there is a confession, without avoidance; and in the last, there is neither traverse, confession, nor avoidance (d).

(a) As to the plea of tender, see Eckstein v. Reynolds, 7 A. & E. 80; Poole v. Tunbridge, 2 Mee. & W. 223. As to the law relative to a tender in bank notes, gold, silver, &c., vide sup. p. 320; vol. II. p. 532.

(b) The effect of this plea (which is given by 3 & 4 Will. 4, c. 42, s. 21, and the form of which is amended by 15 & 16 Vict. c. 76, s. 71), is, that it puts the plaintiff to the alternative of either accepting the proposed sum, or proceeding at his peril so far as future costs are concerned. (As to the effect on costs, see Reg. Gen. Hil. T. 1853, r. 12.) But it is not allowed in actions for assault and battery, false imprisonment, libel, (except in the particular case mentioned, sup. p. 469), slander, malicious arrest or prosecution, or debauching the plaintiff's daughter or servant; and where pleaded only by one of several defendants, it can be pleaded only by leave of the court or a judge. (15 & 16 Vict. c. 76, s. 72).

(c) As to estoppel, vide sup. vol. I. p. 482, n. (d).

(d) At the time of passing the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, it was a rule that the defendant could not plead specially such matter as amounted in effect to the general issue, but must plead the general issue in terms; it being essential to the nature of a special or affirmative plea, that the matter of it should be such as to give *some colour* to the plaintiff's claim,—so that a plea that gave no colour ought to be by way of traverse. Thus, if in an action of trespass the defendant's case was that he claimed

The plea being delivered, it is then to be encountered by the plaintiff, upon peril that if he fail to do so within the proper period (*e*), the defendant is entitled to sign judgment by default. In encountering the plea, the plaintiff has the same right of applying to have it struck out or amended, if its frame be objectionable, as the defendant had with regard to the declaration; or supposing no such objection to arise, is put to the same alternative of demurring for substantial insufficiency in law, or pleading some matter of fact (*f*). If the plaintiff pleads, he is said to *reply*, which he does by delivering a *replication;* and

by feoffment with livery from A., by force of which he entered on the lands in question, he could not plead the matter in that form, because it would amount to a plea of *not guilty* of the trespass; and he was therefore obliged to plead not guilty. This rule, however, might be evaded by *expressly* giving colour to the plaintiff. Thus, in the case supposed, the defendant, after setting forth his own title by feoffment with livery, might proceed to allege, (by a mere fiction,) that the plaintiff, claiming by *colour* of a prior deed of feoffment without livery, entered; upon whom *he* entered; and might thus refer to the judgment of the court which of the two titles was the best. For colour thus *expressly* given cured the want of implied colour, which would otherwise have vitiated the plea. All this subtlety however, (though curious as illustrating the close logic applied, in antient times, to the subject of pleading,) is now very properly set aside; for by 15 & 16 Vict. c. 76, s. 64, *colour*, (that is, express colour,) shall no longer be necessary in any pleading. How far the rule itself that express colour was intended to evade, (viz., that prohibitory of a special plea amounting to the general issue,) has been affected by the Act, does not distinctly appear.

(*e*) The plaintiff must, as a general rule, reply within four days after notice to reply has been delivered to him by the defendant. 15 & 16 Vict. c. 76, s. 53.

(*f*) By a provision analogous to that already noticed, sup. p. 573, it is recently provided, by 17 & 18 Vict. c. 125, s. 85, that the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon *equitable* grounds, and such replication shall begin with the words, "For replication on equitable "grounds," or words to the like effect. But both enactments are subject (by sect. 86) to the following proviso, "that in case it shall ap- "pear to the court or any judge "thereof, that any such equitable plea, "or equitable replication, cannot be "dealt with by a court of law, so as "to do justice between the parties, "it shall be lawful for such court or "judge, to order the same to be "struck out, on such terms as to "costs and otherwise, as to such "court or judge may seem reason-

to this also the same alternative applies that was before noticed in the case of the plea, viz. that it must either traverse the last pleading, or confess and avoid it. But here also, as in the case of the plea, may occur an occasional exception to the regular course; for the plaintiff may sometimes find it expedient to reply by way of *estoppel* (*g*); —or, in other cases, to reply by way of *new assignment*, that is, to allege that he brought his action not for the cause supposed by the defendant, but for some other cause, to which the plea at present pleaded has no application; a species of reply which, like the estoppel, neither confesses nor denies the matter of the plea, its true drift being to show that the plea is irrelevant, or beside the mark (*h*). But in general, the replication is subject, (as before stated,) to the alternative of traverse, or confession and avoidance; and upon the same principles are constructed all the subsequent allegations that may occur on either side, until the pleading is exhausted (*i*). These we shall accordingly particularize no further, except by remarking that to the replication, the defendant may *rejoin*, or deliver an answer called a *rejoinder*; that the plaintiff may answer the rejoinder, by a *surrejoinder*; that the defendant may upon that, deliver a *rebutter*; and that this may be followed by a *surrebutter*, on the part of the plaintiff; but beyond a surrebutter the pleadings seldom happen to extend: and after that stage, they are not distinguished by any separate denomination (*j*).

"able." Upon the construction and effect of the enactments here in question, see the following cases: Mines Royal Societies *v.* Magnay, 10 Exch. 489; Wood *v.* Copper Mines Company, 17 C. B. 561; Wodehouse *v.* Farebrother, 5 Ell. & Bl. 277.

(*g*) Vide sup. p. 574.

(*h*) By 15 & 16 Vict. c. 76, s. 87, one new assignment only, shall be pleaded to any number of pleas to the same cause of action.

(*i*) We may remark here, that as some security for the regular and proper construction of the pleadings, all pleas, &c. (with the exception of those concluding to the country, and a few others,) were formerly required to be under the signature of counsel. But now by 15 & 16 Vict. c. 76, s. 85, such signature shall not be required to any pleading.

(*j*) Blackstone remarks (vol. iii. p. 310), that these pleas, replica-

To the whole of this series applies, the general rule, that neither party can desert or vary from the title or defence, which he has once insisted on. For this, (which is called a *departure* in pleading,) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea; which alleged that no such award was made (*k*).]

At some stage of this series, more or less remote, it is obvious that the parties will necessarily be *brought to issue;* for as the allegation of new matter cannot be interminable, (particularly where no *departure* is allowed,) they must at length arrive, (if no objection to the form of the pleadings, as tending to embarrassment or delay, should arise, or after any such objections have been disposed of,) either at some exception, by way of demurrer, to the sufficiency of the last pleading in point of substance,—which is an issue in law; or at the denial on one side, of some matter of fact alleged on the other,—which is an issue in fact; and in either case the attainment of this result is marked, by delivering to the party demurring or traversing, on the part of his adversary, an appropriate formula,—called a *joinder in demurrer*, where the issue is in law,—and a *joinder of issue*, where the issue is in fact (*l*).

tions, &c. answer to the *exceptio*, *replicatio*, *duplicatio*, *triplicatio*, *quadriplicatio*, of the Roman law, and cites 4 Inst. 14; Bract. l. 5, tr. 5, c. 1.

(*k*) It does not distinctly appear how far the act 15 & 16 Vict. c. 76, affects the rule as to *departure*. Supposing, however, a pleading that involves a departure to be no longer open to demurrer, it would seem that, as tending to embarrassment and delay, it would be liable to be struck out upon an application under the 52nd section.

(*l*) The proper formula in either case, will be found in 15 & 16 Vict. c. 76, ss. 79, 89. The party demurring may give notice to join in demurrer, in four days, otherwise judgment. Reg. Gen. Hil. T. 1853, (Pr.) r. 14.

The case, however, is occasionally such as to give rise to a new series of pleading, before the ultimate issue between the parties is attained. For [it may sometimes happen, that after the defendant has pleaded, nay, even after issue joined, there may have arisen some new matter, which it is proper for the defendant to plead; as that the plaintiff has given the defendant a release, and the like. Here, if the defendant takes advantage of this new matter as early as he possibly can, he is permitted to plead it in what is called a plea *puis darrein continuance* (*m*). For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former (*n*).] But in order to do this, he necessarily relinquishes the former defence, and pleads the new matter by way of substitution for it; to which the plaintiff replies: and issue in law or fact is thus ultimately obtained upon the plea *puis darrein continuance*, according to the principles already explained with respect to that originally pleaded.

With a view to clearness of statement, we have hitherto supposed the declaration to comprise only a single matter of demand or complaint, and the plea only a single matter of defence; and the same character of unity to pervade the whole course of the pleading. But it is necessary here to remark that the plaintiff may have occasion to bring forward several distinct matters of demand or complaint; and that, in that case, he is allowed to insert them in the declaration cumulatively, (provided they are not claims in different rights, or between different parties (*o*),) in the form

(*m*) It is so called because pleaded since the last adjournment; for the adjournments of the court were formerly called *continuances*. By the 15 & 16 Vict. c. 76, s. 69, such a plea must have an allegation that the matter arose after the last pleading; and may, when necessary, be pleaded at *nisi prius*, between the 10th of August and the 24th of October; but in no case shall be allowed, unless accompanied with an affidavit that the matter thereof arose within eight days next before the pleading of the same, or unless the court or a judge shall otherwise order.

(*n*) 3 Bl. Com. 316.

(*o*) By 15 & 16 Vict. c. 76, s. 41,

of several distinct statements, technically denominated *counts* (*p*). So the defendant may have occasion to bring forward several distinct matters of defence, in regard to the same matter of demand or complaint; and is permitted in that case, (upon first obtaining the leave of the court or a judge for the purpose,) to resort to as many different pleas (*q*). And it is competent to him also, by the like leave, to plead and demur concurrently to the same matter of demand or complaint (*r*). So the plaintiff may after-

it is provided, that causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; (with the exception, however, of the action of replevin or of ejectment.) And see section 40, enabling a husband to claim in respect of an injury done to his wife, and also to claim in his own right, in the same action. Before this statute, not only claims in different rights or between different parties were incapable of being joined, but, generally speaking, claims in different forms of action; for example, in debt and in trespass.

(*p*) This formerly led to the abuse of inserting in the declaration a variety of counts, where there was in fact only *one* cause of action;—that is. to shape a single cause of action in various modes, so that failing to prove one count, the plaintiff might have a chance of proving another. But now several counts on the same cause of action are not, in general, allowed. (Reg. Gen. Hil. T. 1853, (Pl.) rr. 1, 2, 3.)

(*q*) 15 & 16 Vict. c. 76, s. 81. A rule of court was formerly required for this purpose in every case; but now by 15 & 16 Vict. c. 76, s. 82, a judge's order will suffice; and by sect. 84, the following pleas, or any two or more of them, may be pleaded together *as of course*, and without any order for the purpose; a plea denying any contract or debt alleged in the declaration; a plea of tender as to part; a plea of the statute of limitations; of set-off; of bankruptcy of the defendant; of his discharge under an insolvent act; of *plene administravit*: *of plene administravit præter*; of infancy, or coverture; of payment; of accord and satisfaction; of release; of not guilty; of a denial that the property, an injury to which is complained of, is the plaintiff's; of leave and licence; and of *son assault demesne*. In other cases, the court or judge is at liberty to require from the defendant or his attorney, as the conditions of the leave applied for, an affidavit, "That he is advised and "believes that he has just ground to "traverse the several matters pro- "posed to be traversed by him, and "that the several matters sought to "be pleaded as aforesaid by way of "confession and avoidance, are re- "spectively true in substance and in "fact." Ibid. s. 81.

(*r*) 15 & 16 Vict. c. 76, s 80. In this case the court or judge is at liberty to require from the defendant or his attorney an affidavit to the same effect as set forth in the

wards exercise similar rights on his part;—for by the like leave he may make several replications in answer to the same matter of defence, or may demur and reply concurrently, to the same matter of defence; and the same principle is established with respect to every subsequent step in the series of allegations (s). It is obvious, therefore, that the pleading will not always lead to the production of a *single* issue only, but often, (and indeed most commonly,) to the production of *several*. To return now to the progress of the suit.

We have said that issues in law are to be referred to the decision of the judges of the court. This is done upon solemn argument by counsel on both sides; and to that end a *demurrer book* is made up, containing all the proceedings at length, which is delivered between the parties, and usually by the plaintiff's attorney, to the attorney for the defendant. The demurrer is then *set down for argument;* which may be done at the request of either party; and notice of it is forthwith given to the adversary; and four clear days before the day appointed for argument, the

last note, but with this addition, "that he is further advised and believes that the objections raised "by such demurrer are good and "valid objections in law."

(s) 15 & 16 Vict. c. 76, ss. 80, 81. At every step, however, the court or judge may require, where leave to plead several matters is applied for, an affidavit to the same effect as in note (q), sup., and where leave to plead and demur is applied for, an affidavit to the same effect as in note (r). It is also a rule that pleas founded on one and the same principal matter, and varying only in statement, description, or circumstances, shall not be allowed. (15 & 16 Vict. c. 76, s. 83; Reg. Gen. Hil. T. 1833, (Pl.) r. 2.) It may be remarked here, that at common law the system of pleading widely differed as regards the right of pleading several pleas, &c., from that which is now established. For to avoid confusion and prolixity, defendants were confined, under the system at common law, to a single plea in respect of each distinct matter of demand or complaint; and could not plead and demur concurrently to the same matter; and the same restrictions obtained throughout the whole series. The first innovation upon this strictness was by the provision of 4 Ann. c. 16, allowing the defendant, by leave of the court, to plead several pleas to the same matter; but the common law remained, with this exception, unaltered until the 15 & 16 Vict. c. 76.

plaintiff delivers copies of the demurrer book to the lord chief justice, or, (in the Exchequer), to the lord-chief baron, and the senior puisne judge of the court: and the defendant delivers copies to the two other judges, (only four in each court presiding at the same time); and, on the appointed day, the case is called on for argument (*t*). After hearing council on either side, the court deliver their judgment. For example, [in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causâ venationis*, for that he was hunting, and to this the plaintiff demurs, that is, admits the truth of the plea, but denies the justification to be legal; now on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. And thus is an issue of law, on demurrer, disposed of.] As to which, however, we may further remark, that the judges in delivering their judgment, usually also make known the *reasons* for their opinion.

III. The *trial and evidence.*

If the result of the pleading be not an issue in law, but an issue or issues in fact, it then becomes necessary to determine on which side of every such issue or question the truth lies; a point that is not left, like matter of law, to the court or judges, but to such other methods of decision, as are appropriate by the laws of England to the particular kind of question: and this decision of fact is what is technically understood by the term *trial,*—as to which it may be remarked that it constitutes in every civilized country, the chief business of courts of justice,—[for experience will abundantly show that above a hundred of our law suits arise from disputed facts, for one where the law is doubted of (*u*).]

(*t*) As to demurrer books and setting down for argument, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 15, 16.

(*u*) About twenty days in the

Of trials there are several different species, according to the difference of subject or thing to be tried,—but with the exception of trial by jury, the scope of each is very limited, and its occurrence very infrequent (z). The several methods are as follows:—1. Trial by record; 2. Trial by certificate; 3. Trial by witnesses; 4. Trial by jury (a).

year, says Blackstone, are sufficient in Westminster Hall to settle, upon solemn argument, every demurrer or point of law that arises throughout the nation; but two months are annually spent in deciding the truth of facts before six distinct tribunals, exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits. (3 Bl. Com. 330.) The state of things in our own days is substantially the same.

(z) There is a new mode of trial not included in the text, being scarcely one of the regular modes, but depending on the consent of the parties, and the sanction of the court. This may be called *trial by the judge.* For, by 17 & 18 Vict. c. 125, s. 1 (see also Reg. Gen. M. T. 1854, sched.), it is now enacted, that the parties to any cause may, by consent in writing, signed by them or their attornies, leave the decision of any issue in fact to the court, provided the court or a judge shall, in their or his discretion, think fit to allow such trial; and such issue may thereupon be tried and damages assessed where necessary, in open court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at the assizes. (See Andrews *v.* Elliott, 5 Ell. & Bl. 502; 6 Ell. & Bl. 338.)

(a) Blackstone mentions seven methods of trial; comprising, in addition to those in the text, the trial by *inspection*, the trial *by wager of battel*, and the trial by *wager of law*. (3 Bl. Com. 330.) But as regards the first, it seems doubtful how far, since the abolition of real actions, fines, and appeals of maihem, it can now be considered as in force; and wager of battel has been abolished by 59 Geo. 3, c. 46; and wager of law by 3 & 4 Will. 4, c. 42, s. 13. The nature of this last method has been explained in a former place (vide sup. p. 514. As to the nature of the two others, it will be sufficient for the present purpose to remark that the account given of the trial by *inspection*, by Blackstone, is, that it takes place when for the greater expedition of a cause in some point or issue,—being either the principal question, or arising collaterally out of it, but being evidently the object of sense,—the judges of the court upon testimony of their own senses shall decide the point in dispute; and that the trial by *wager of battel* was the decision of the question of right, in the real action called the writ of right, by a personal contest between the champions of the respective parties, armed with batons. A further account of which, (as formerly applied to *criminal* cases,) will be found in a succeeding part of the work, vide post, bk. VI. c. XXII.

1. First then of the trial by *record*. And here, first, we may remark that a *record* signifies a roll of parchment, upon which the proceedings or transactions of a court are entered or drawn up by its officers; and which is then deposited in its treasury, *in perpetuam rei memoriam*. It is also used indifferently, to express the matter itself which is so entered or transcribed. The time and manner of drawing up these records, in the course of an action, will appear hereafter. At present it is sufficient to observe, that, when complete, they are regarded by our law with very peculiar consideration. For they constitute the only strict and proper proof of the proceedings of the court in which they are preserved; and are also proof of so transcendent and absolute a nature as to admit of no contradiction (*b*). The practice too of drawing up and preserving such documents is confined to the higher courts of justice, so as to have created the distinction, which we have elsewhere had occasion to notice, between courts of record and courts not of record (*c*). As to the mode of trial now in question, it is used only in the particular instance where a matter so recorded, (for example, a judgment,) is pleaded by one of the parties; and the other pleads *nul tiel record*,—that there is no such matter of record existing. Upon this, issue is tendered and joined in the following form: "And this he is ready to verify by the record, and "prays that the same may be seen and inspected by the "court;" and therefore a day is given for the inspection accordingly;—and if the record be not in the same, but in another court, the party by whom its existence is asserted is commanded to bring it in (*d*). Afterwards on the day

(*b*) Co. Litt. 260 a.

(*c*) Vide sup. p. 364.

(*d*) See 2 Chitty on Pleading, 624, 625; Reg. Gen. Hil. T. 1853, (Pr.) r. 38. It is to be observed, that if it be a record of the same court, the record itself must be produced; if a record of an inferior court, a transcript; to obtain which a writ of *certiorari* must be issued; but if a record of a superior court, the record of it is to be brought into Chancery by *certiorari*, and an exemplification of it afterwards sent by *mittimus* to the court where the action is pending. (Arch. Pr. by Chitty (8th ed.), p. 842.)

appointed, the same party moves for judgment in his own favour, which may be opposed by his antagonist; and if the record is found to be in court, and to maintain the issue, judgment is then given for the party by whom its existence was asserted; but in the opposite event, against him. In the same manner titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the sovereign's patent only, which is a matter of record (*e*); or in the case of creation by writ, then by the record of parliament (*f*). [Also in case of an alien, "whether alien friend or enemy," shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of record (*g*). And also whether a manor be to be held in antient demesne or not, shall be tried by the record of *Domesday* in the Exchequer (*h*).]

2. [The trial by *certificate*, is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. As therefore such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus, first, if the issue be whether A. was absent with the king, in his army out of the realm, in time of war, this shall be tried,] says Littleton, [by the certificate of the mareschal of the king's host, in writing, under his seal; which shall be sent to the justices (*i*). So if, in order to avoid an outlawry or the like, it was alleged that the defendant was in prison *ultra mare* at Bordeaux, or in the service of the mayor of Bordeaux,] that place being, at the time, part of the dominions of the Crown, [this should have been tried by the

(*e*) 6 Rep. 53; Rex *v.* Knollys, 1 Ld. Ray. 10.

(*f*) Co. Litt. 16 b; and note (3) by Harg.

(*g*) 9 Rep. 31.

(*h*) Ibid. It is to be observed, that in the instances here mentioned of proof by the royal letters-patent, by treaty, and by Domesday, the word record is taken in a somewhat larger sense, and not in its strict technical meaning, according to which it refers exclusively to the proceedings of a *court of justice*.

(*i*) Litt. s. 102.

[certificate of the mayor.] And, in like manner, [we find that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons (*k*). Secondly, in matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of the recorder (*l*), upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by a jury (*m*): as the custom of distributing the effects of freemen deceased, of enrolling apprentices, or that he who is free of one trade may use another,—if any of these or similar points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested in the suit,—as in an action brought for a penalty inflicted by the custom; for there the reason of the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen certifying by the mouth of their recorder (*n*). Thirdly, in some cases, the sheriff of London's certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London or a foreigner (*o*), in case of plea of privilege to be sued only in the city courts. Of a nature somewhat similar to which, is the trial of the privilege of the University, when the chancellor claims conusance] of a cause between two private persons, (as the practice of the Superior courts, in the case both of Cambridge and Oxford, allows him to do,) [because one of the parties is a privileged person (*p*). In this case, the charters, confirmed by act of

(*k*) Bartue and the Duchess of Suffolk's case, Dy. 176, 177.

(*l*) Co. Litt. 74; Plummer *v.* Bentham, 1 Burr. 248.

(*m*) Bro. Ab. tit. Trial, pl. 96. As to the form of the suggestion for the purpose of obtaining a trial by certificate of the custom of London, see Crosby *v.* Hetherington, 5 Scott, N. R. 654. See also, Pulling on the Laws, &c. of London, p. 4.

(*n*) Day *v.* Savage, Hob. 114.

(*o*) 2 Roll. Ab. 583.

(*p*) Vide sup. p. 441. By a late Act, the privilege is now, in the case of Cambridge, more restricted than in the case of Oxford. (Ibid.)

[parliament, direct the trial of the question, "whether a privileged person or no," to be determined by the certificate and notification of the chancellor under seal; to which it hath also been usual to add an affidavit of the fact: but if the parties be at issue between themselves whether A. is a member of the University or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate; because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of conusance is made by him, and not where the defendant himself pleads his privilege; so that this must be left to the ordinary course of determination. Fourthly, in matters of ecclesiastical jurisdiction, the *ability of a clerk* presented, and the *admission*, *institution* and *deprivation of a clerk*, shall also be tried by certificate from the ordinary or metropolitan; because of these he is the most competent judge (q): but *induction* shall be tried by a jury, because it is a matter of public notoriety (r), and is likewise the corporal investiture of the temporal profits (s). Resignation of a benefice may

(q) 2 Inst. 632; Show. Parl. c. 81; 2 Roll. Ab. 583. Blackstone also enumerates among the matters to be tried by the bishop's certificate, "*marriage*, and, of course, *general* "*bastardy*." And he proceeds to remark as follows: "If a man claims "an estate by descent, and the "tenant alleges the demandant to be "a bastard, or if, in dower, the heir "pleads no marriage, all these, being "matters of mere ecclesiastical cog-"nizance, shall be tried by certificate "from the ordinary. But in an ac-"tion on the case for calling a man "bastard, the defendant having "pleaded in justification, that the "plaintiff was really so, this was "directed to be tried by a jury, (Hob. "213), because whether the plain-"tiff was found a *general* or *special* "bastard, the justification will be "good; and no question of special "bastardy shall be tried by the "bishop's certificate, but by a jury "(Dy. 79). For a special bas-"tard is one born before marriage, "of parents who afterwards inter-"marry; which is bastardy by our "law, though not by the ecclesi-"astical. It would, therefore, be "improper to refer the trial of that "question to the bishop, who, whe-"ther the child be born before or "after marriage, will be sure to cer-"tify him legitimate." But it is to be considered how far the law as to the trial of marriage has been now altered by 20 & 21 Vict. c. 85, s. 2, which withdraws the cognizance of all matters matrimonial from the Ecclesiastical Courts.

(r) Sir H. Sidney v. Bishop of Gloucester, Dy. 228.

(s) Vide sup. p. 30.

[be tried in either way,—but it seems most properly to fall within the bishop's cognizance (*t*). Fifthly, the trials of all customs and practice of the courts, shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ, by the sheriff or under-sheriff, shall be only tried by his own certificate (*u*). And thus much for those several issues or matters of fact, which are proper to be tried by certificate.]

3. [A third species of trial is that by *witnesses, per testes*, without the intervention of a jury. This is the only method of trial known to the civil law: in which the judge is left to form, in his own breast, the sentence, upon the credit of the witnesses examined; but it is very rarely used in our law, which prefers the trial by jury before it, in almost every instance. Save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead, this being looked upon as a dilatory plea, is, in favour of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges; and so, saith Finch, shall no other case in *our* law (*x*).]

4. [The subject of our next inquiry, will be the nature and method of the trial by *jury;* called also,] in technical language, [the trial *per pais*, or *by the country;* a trial that hath been used time out of mind in this nation,] and the origin of which is so remote, that it has not hitherto been satisfactorily traced (*y*).

(*t*) 2 Roll. Ab. 583.

(*u*) 9 Rep. 31.

(*x*) Finch, L. 423. Sir E. Coke, however, mentions some others as occurring in real actions. (1 Inst. 6; 9 Rep. 30.) It is to be observed, that what is here said of the rarity of the trial by witnesses, is quite correct, notwithstanding the mode of trial without a jury, in the new County courts, (vide sup. p. 384,) and the mode of trial by the judge, mentioned sup. 582, n. (*z*); for the term *trial by witnesses* is never applied to these.

(*y*) Blackstone considers this mode of trial as having been "universally "established among all the northern "nations, and so interwoven in their "very constitution, that the earliest "accounts of the one give us also "some traces of the other."—(3 Bl. Com. 349.) He also says, that it is mentioned in England as early as in the laws of Ethelred, for which he cites Wilk. Ll. Anglo-Sax. 117, (though the passage cited will be

This being the ordinary, and in practice almost the invariable, mode of trial in the English law, and at the same time one of the most important and celebrated of its institutions, we shall proceed to the dissection and examination of it in all its parts.

Here, however, it may be proper to explain, that there are several different forms of this proceeding. The first is a trial *at bar;* that is, a trial before the judges of the court in which the action is brought, sitting for that purpose in *banc* (z). This method is comparatively rare, and takes place only in causes of difficulty or importance; or where the Crown is concerned in interest, and insists on its right to have the cause so tried. As between private parties, it can take place only by special permission of the court (a). The second, (which is the ordinary one,) is the trial at *nisi prius;* which takes place, (as formerly ex-

found to refer not to trial by jury, but to an inquisition by twelve persons in the nature of a grand jury.) He speaks, however, of the date of its first establishment among us as unknown; and the same uncertainty is confessed in a much later work, where, though trial by jury is considered as having been in use among the Anglo-Saxons, it is remarked, that "no record marks the date of its commencement."—(Turner's Hist. Ang. Sax. vol. iii. p. 223, 6th edit.) We must add, that when the Anglo-Saxon memorials are carefully scrutinized, we find them to be such as even to justify a doubt whether trial by jury, (in any sense corresponding to our use of that term,) did actually exist among us at any time before the Norman Conquest. (See Hickes, Thes. Diss. Epist.; Hallam, Mid. Ag. vol. ii. p. 396, 7th ed.; Reeves's Hist. Eng. Law, vol. i. pp. 24, 83.) The most probable theory seems to be that we owe the germ of this, (as of so many other of our institutions,) to the Normans. (Vide sup. vol. I. p. 45.) At the date of Bracton's work, in the time of Henry the third, it had taken among us (in substance,) the shape which it now wears; but its rudiments appear as early as the reign of Henry the second. Indeed, the particular species of it, called the *grand assize,* which was appropriate to the trial of the question of *mere right,* (vide sup. p. 480,) was established by a positive law of that monarch's reign. (Glanv. l. 2, c. 7.)

(z) Vide sup. pp. 515, 556.

(a) Vide 11 Geo. 4 & 1 Will. 4, c. 70, s. 7. As to the practice on this mode of trial, see Buron *v.* Denman, 1 Exch. 769; 15 & 16 Vict. c. 76, s. 97; Reg. Gen. Hil. T. 1853, (Pr.) r. 41. As to the cases when it will not be allowed, Dimes *v.* Ld. Cottenham, 1 L. M. & P. 318.

plained (*b*),) either before the chief justice, or some other judge, at the sittings for London or Middlesex, or before the judges of assize upon the different circuits;—and in the latter case as well as the former, it is conducted in effect before a single judge only—it not being the practice for more than one judge to sit in the same cause, upon circuit. The third is a trial *before the sheriff* (*c*); which is a method adapted to the case where the action is for a liquidated debt or demand, in which the sum sought to be recovered and indorsed on the writ of summons does not exceed 20*l.*; and where the trial is not likely to involve any difficult question of fact or law: it being provided by statute 3 & 4 Will. IV. c. 42, s. 17, that in such cases, the trial may, by leave of the court or any one of its judges, be held before the sheriff, or before the judge of any court of record for the recovery of debt, within the county (*d*). But of these methods we propose to discuss the trial at *nisi prius* only, which is the ordinary and regular one,—and shall only remark with respect to the rest, that they have in general the same incidents with this, particularly as regards the law of evidence, which applies to all the three alike.

When therefore an issue in fact has been joined (*e*), and the trial is intended to take place at *nisi prius*, the plaintiff's attorney is first to *make up and deliver the issue;* that is, to draw up a transcript, on paper, of all the pleadings, and deliver it to the defendant's attorney, that he may ascertain it to be a correct copy of the pleadings which have actually taken place; which transcript is itself called

(*b*) Vide sup. p. 414—418.

(*c*) As to the practice on trial *before the sheriff*, vide Pryme *v.* Titchmarsh, 10 Mee. & W. 605; Reg. Gen. Hil. T. 1853, (Pr.) r. 58, and Forms in schedule, Nos. 7, 8, 11.

(*d*) Debts and demands not exceeding 50*l.* may now be sued for, as we have seen, in the County Courts. (Vide sup. p. 377.) It is also now enacted, by 19 & 20 Vict. c. 108, s. 26, that where, in an action of contract brought in a Superior Court, the claim indorsed on the writ does not exceed 50*l.*, or has been reduced by payment into Court, &c., to a sum not exceeding 50*l.*, a judge, on the application of either party, after issue joined, may order that the cause be tried in a County Court to be named by him.

(*e*) Vide sup. p. 577.

the issue,—its most material part being the question or issue in which the pleadings have terminated (*f*).

The next step is to *enter the proceedings on record;* which the plaintiff's attorney does by transcribing on a parchment roll, the issue so made up, and delivering the same at the proper office of the court (*g*). This roll is called the *Nisi Prius Record* (*h*).

The jury for trial of the issue or issues, which the *nisi prius* record comprises, is constituted as follows:—In any county, except London and Middlesex, a precept is issued by the judges of assize to the sheriff, directing him to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which shall come on for trial at the assizes (*i*). But, in London or Middlesex, a precept issues to the sheriff, under the hand of a judge, for summoning a sufficient number of jurors for the trial of all issues in the superier courts, at the sittings of *nisi prius*, held in those counties (*k*). In either case, however, a printed panel, or slip of parchment containing the names of the jurors, is to be made by the sheriffs, and kept open to public inspection; and a copy of it, is to be delivered out to the parties, and annexed to each *nisi prius* record sent from the superior court for trial at those assizes or sittings (*l*); and this panel is to contain the names, abodes, and additions of a number of jurors, not less than forty-eight, nor exceeding seventy-two, taken from the *jurors' book;* which, by statute 6 Geo. IV. c. 50 (*m*), is to be an-

(*f*) As to the form of this transcript, see Reg. Gen. Hil. T. 1853 (Pr.), schedule No. 1.

(*g*) 15 & 16 Vict. c. 76, s. 102.

(*h*) See as to its form, Reg. Gen. above cited, sched. No. 2.

(*i*) 15 & 16 Vict. c. 76, s. 105.

(*k*) Ibid. s. 107. By 17 & 18 Vict. c. 125, s. 59, it is provided, "that the several courts, or any "judge thereof, may make all such "rules or orders upon the sheriff or "other person as may be necessary "to procure the attendance of a special or common jury for the trial of "any cause or matter pending in "such courts at such time and place, "and in such manner, as they or he "may think fit."

(*l*) 15 & 16 Vict. c. 76, ss. 105—107.

(*m*) 6 Geo. 4, c. 50, s. 12. It is by this statute, (as affected by 15 & 16 Vict. c. 76, and 17 & 18 Vict. c.

nually made out in each county, out of lists returned from each parish, of persons qualified to serve as jurors(*n*).

The course above described, however, provides only for cases in which the trial is intended to be by a *common* jury; that is, a jury consisting of persons who possess only the ordinary qualification in point of property, to which we shall have occasion hereafter to refer. But it is in the option either of plaintiff or defendant, in lieu of this, to have the cause tried by a *special* jury; viz., a jury consisting of persons, who, in addition to the ordinary qualifications (*o*), are of a certain station in society; viz., esquires or persons of higher degree, or bankers or merchants (*p*). To provide for *country* causes, in which resort is had to a special jury, and notice thereof has been given, the sheriff is directed, by the same precept of the judge of assize already mentioned, to summon a sufficient number of special jurymen, not exceeding forty-eight in all, to try all the special jury causes at the approaching assizes: and a printed panel of the special jurors so summoned, is to be kept in the sheriff's office for public inspection; and a copy of it delivered out to parties, and annexed to the *nisi prius* record, in the same manner as in the case of common jurors (*q*). But with respect to London and Middlesex (or *town*) causes, the practice is somewhat different; for where any such cause is intended to be tried by a special jury, a rule of court must be obtained for the purpose (*r*); and due notice of such intention having been given to the opposite party and to the sheriff, recourse is to be had, by the sheriff, to the *special*

125, s. 59,) that the whole practice relative to summoning jurors, and the qualification of jurors, is now mainly regulated.

(*n*) As to the expenses of making out these lists, see 7 & 8 Vict. c. 101, s. 60.

(*o*) As to these, vide post, p. 599.

(*p*) See 6 Geo. 4, c. 50; 3 & 4 Will. 4, c. 42, s. 35; 15 & 16 Vict. c. 76, ss. 112, 113; Reg. Gen. Hil. T. 1853, (Pr.) rr. 44, 45.

(*q*) No special jury needs be summoned by the sheriff, unless he has received notice to do so from a party to one or more of the causes to be tried. Reg. Gen. Hill. T. 1853, (Pr.) r. 47.

(*r*) 15 & 16 Vict. c. 76, s. 110; see Reg. Gen. Hil. T. 1853, r. 45.

jurors' list; being a list annually made out by him of persons qualified to act as special jurors (*s*). Tickets corresponding with the names of the jurors on this list, being put into a box and shaken, the officer (*t*) takes out forty-eight; to any of which names either party may object for incapacity; and supposing the objection to be established, another name is substituted; and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking off such as each party shall in his turn wish to be removed, the twenty-four are accordingly summoned, and their names are placed upon a panel,—to be kept for public inspection, delivered out and annexed to the *nisi prius* record, according to the same practice as in country causes (*u*). This last method is commonly described as the *striking* of a special jury (*x*).

We may now return to the particular suit in which we have supposed issue to have been joined, and a *nisi prius* record entered.

The next step for the plaintiff's attorney to take, provided he has previously given *notice of trial*—a notice which he is entitled to give as early as the delivery of the replication (*y*),—*is to enter the cause for trial* (*z*). For this purpose, the panel already described having been annexed to the *nisi prius* record, that record is to be taken to the proper officer of the court, and entered with him. If it be not so entered, the cause cannot be tried. [Therefore it is in the plaintiff's breast to delay any trial by

(*s*) 6 Geo. 4, c. 50, s. 31.

(*t*) 15 & 16 Vict. c. 76, s. 110.

(*u*) Ibid.

(*x*) 6 Geo. 4, c. 50, s. 32. By 15 & 16 Vict. c. 76, s. 108, the court may, if they think fit, order a special jury, in any particular country cause also, to be struck as before the Act.

(*y*) It must be a ten days' notice at least, in all cases, except that of an ejectment by a landlord against a tenant holding over, when the right of entry accrues after Hilary or Trinity Term; in which case only six days are required. And if the defendant is under terms to take "*short notice*," only four days are required. (15 & 16 Vict. c. 76, ss. 97, 217.) As to notice of trial, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 34—37, 40, 41.

(*z*) As to entry of causes for trial in London and Middlesex, see Reg. Gen. Hil. T. 1853, (Pr.) r. 83.

[not carrying down the record, unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff, which proceeding is called the *trial by proviso* (*a*);] and it is moreover now provided, that if, after issue joined, such issue has not been brought on to be tried according to the course of the court (*b*), the defendant, after such notice as the practice also prescribes in that behalf, shall be at liberty to suggest on the record, that the plaintiff has failed to proceed to trial, though duly required to do so; and may sign judgment for his costs (*c*).

[Let us now pause awhile, and observe with (Sir Matthew Hale (*d*)), in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first, the person summoning the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty.] Next, as to the course of proceeding, it is, as we have seen, so managed, that [the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connexions, and relations, that so they may be challenged upon just cause.] Thirdly, [as to the place of their appearance: which in causes of weight and consequence, is at the bar of the court, but in ordinary cases, at the assizes], or sittings at *nisi prius*; [held in the

(*a*) See as to this Reg. Gen. Hil. T. 1853, (Pr.) r. 42. As to a *writ of trial* being carried down by proviso, see Nicholson *v.* Jackson, 1 C. B. 622.

(*b*) The course of the court in this respect, is described in 15 & 16 Vict. c. 76, s. 101.

(*c*) 15 & 16 Vict. c. 76, s. 101. Upon a failure by one of the parties to proceed to trial, pursuant to notice, it is also provided that a rule for the costs of the day may be obtained by the other party, without motion. 15 & 16 Vict. c. 76, s. 99. Et vide Reg. Gen. Hil. T. 1853, (Pr.) r. 39.

(*d*) Hist. C. L. c. 12.

[county where the cause of action arises, and the witnesses and jurors live; a provision most excellently calculated for the saving of expense to the parties. For though the preparation of the causes, in point of pleading, is transacted in the capital, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, one attorney being able to transact the business of many clients. But the troublesome and most expensive attendance, is that of jurors and witnesses at the trial; which therefore is brought home to them in the county where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges of the courts at Westminster, if it be a trial at bar,] or at the London or Middlesex sittings; [or the judges of assize delegated from the courts at Westminster by the Crown, if the trial be held in the country; persons whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county, is also of infinite service in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of peace and the like (*f*).] And we may further remark, that [as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These judges, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts

(*f*) So much consequence was formerly attached to this consideration, that it was, as we have seen, once ordained that no man of the law should be judge of assize in his own county. Vide sup. p. 416.

[of appeal or advice to each other. And hence their administration of justice and conduct of trials, are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment (*g*).

But let us now return to the assizes,] or sittings at *nisi prius*, where, (all previous steps having been regularly settled,) we will suppose the cause to be called on in court. The nisi prius record [is then handed to the judge to peruse, and observe the pleadings, and what issues the parties are to maintain and prove; while the jury is *called* and *sworn*.

The calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the panels annexed to the nisi prius record, and calling them over in the order in which they are so drawn (*h*); and the twelve (*i*) persons whose names

(*g*) The recent establishment of the new County Courts, in causes of small amount, (as to which, vide sup. p. 377, et seq.,) is not to be considered as any disparagement to these remarks; but as a sacrifice made, in such causes, to the great objects of economy and expedition.

(*h*) 6 Geo. 4, c. 50, s. 26; 15 & 16 Vict. c. 76, ss. 108, 110.

(*i*) In this patriarchal and apostolical number of twelve, of which a jury in the superior courts always consists, "Lord Coke has discovered," (says Blackstone, vol. iii. p. 366,) "abundance of mystery." (See Co. Litt. 155.) And he proceeds to remark, that Dr. Hickes, who attributes the introduction of this number to the Normans, tells us that among the inhabitants of Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number *twelve*. "*Nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.*" Mr. Hallam also (Hist. Mid. Ag. vol. ii. p. 401, 7th ed.) remarks upon the veneration with which this number was regarded in Scandinavia generally, and cites Spelman's Glossary, voce *Jurata;* Du Cange, voce *Nembda;* and the Edinb. Review, vol. xxxi. p. 115; which last he characterizes as "a most learned and elaborate essay." He observes, too, that Spelman has produced several instances of the regard paid to twelve, in the early German laws; and we have seen in a former note, (vide sup. p. 587, n. (*y*),) that there is distinct evidence that twelve jurors were in use among the Anglo-Saxons for an *inquisition*, though there seems no sufficient proof that it was used by them as the number for *trial*.

are first called, and who appear, are sworn as the jury; unless some just cause of challenge or excuse, with respect to any of them, shall be brought forward. It sometimes happens, however, that on the application of one of the parties before the trial, a rule of court or judge's order has been obtained, directing that a *view* should be had, by certain of the jurors on the panel, of the messuages, lands, or place in question: [in which case, six or more of the jurors, to be agreed on by the parties,] or nominated by the sheriff, [shall be appointed to have the matter in question shown to them by two persons named in the rule or order; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest, previous to any other jurors (*k*).]

After the jurors have appeared, they are liable, before they are sworn, to be [*challenged* by either party. Challenges are of two sorts—challenges to the *array*, and challenge to the *polls*.

Challenges to the array, are an exception at once to the whole panel in which the jury are arrayed, or set in order, by the sheriff (*l*); and they may be made upon account of partiality or some default in the sheriff, or his under officer, who arrayed the panel;] as if the sheriff be a party in the suit, or related, by either blood or affinity, to either of the parties. [Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomi-

(*k*) As to *view*, see 6 Geo. 4, c. 50, s. 24; 15 & 16 Vict. c. 76, s. 114; by the last of which enactments the *writ* of view formerly required in such cases is dispensed with. See also Reg. Gen. Hil. T. 1853, (Pr.) rr. 48, 49, by which the rule may be drawn up by the officer, upon the affidavit of the party applying, without any motion. By 17 & 18 Vict. c. 125, s. 58, it is now provided, that either party may apply to the court or a judge for the *inspection* by the jury, or by the party himself, or by his witnesses, of any real or personal property, the inspection of which is material to the determination of the question in dispute; but this is to be without prejudice to the provisions of any preceding Act, as to obtaining a *view* by a jury.

(*l*) It is considered as very doubtful, if a challenge to the array can be made, when the jury is *special*. 1 Arch. Pr. by Chitty (8th edit.), p. 424.

[nation, or under the direction of either party, this is a good cause of challenge to the array (*m*).]

A challenge to the array may be either by way of *principal* challenge, or a challenge *to the favour;* the former, being on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality, as that the son of the sheriff has married the daughter of the adverse party, or the like (*n*): and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course; the allowance of the latter, is matter of judgment and discretion only (*o*). If the challenge be controverted by the opposite party, it is to be left to the determination of two persons, to be appointed by the court (*p*); and if these persons, called *triors,* decide in favour of the objection, the array is to be quashed, and a new jury impanelled by the coroner (*q*); who acts in this, as in many other in-

(*m*) Formerly, if a lord of parliament had a cause to be tried, and no *knight* was returned upon the jury, it was a cause of challenge to the array. (Co. Litt. 156 a; Selden, Baronage, ii. 2.) But this objection is now taken away. See 24 Geo. 2, c. 18; 6 Geo. 4, c. 50, s. 28. Moreover, it was long necessary that some of the jury should be returned from the neighbourhood where the cause of action was laid in the declaration, so that if none were returned at least from the same hundred, the array might be challenged for want of *hundredors;* an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto,* and were indeed in the nature of *witnesses,* rather than judges. But the necessity for the hundredors also was by successive statutes gradually abolished. See 27 Eliz. c. 6; 4 Anne, c. 16; 24 Geo. 2, c. 18. And see as to criminal cases, 6 Geo. 4, c. 50, s. 13. The array might also formerly be challenged if an *alien* were party to the suit, and if, (after application made to the court for that purpose,) the sheriff did not return a jury *de medietate linguæ,* that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. And this trial by a jury *de medietate* is still allowed in trials for felony or misdemeanor; but no longer in a civil action. See 6 Geo. 4, c. 50, ss. 3, 47.

(*n*) Co. Litt. 156 a.

(*o*) Ibid.; et vide 3 Bl. Com. 363.

(*p*) It is said that a principal challenge may be tried by the court itself, without the intervention of triors, Arch. Pr. by Chitty (8th ed.), p. 427. See Mayor of Carmarthen *v.* Evans, 10 Mee. & W. 274.

(*q*) Newman *v.* Edmonds, 1 Bulst. 114; 2 Hale, P. C. 275; R. *v.* Ed-

stances, as substitute for the sheriff, in executing process, where the latter is deemed an improper person (*r*).

[Challenges to the polls, *in capita*, are exceptions to particular jurors, and seem to answer the *recusatio judicis* in the civil and canon laws; by the constitution of which, a judge might be refused upon any suspicion of partiality (*s*). By the laws of England also, in the times of Bracton (*t*) and Fleta (*u*), a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged (*x*). For the law will not suppose a possibility of bias or favour in a judge who is already sworn to administer impartial justice,] and whose conduct upon the judgment seat, is under the immediate check of public observation. [And should the fact at any time prove flagrantly such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct (*y*).

But challenges to the polls of the jury, (who are judges of fact] only, and are merely private persons,) do not fall under the same principle, and are consequently allowed. They [are reduced to four heads by Sir E. Coke (*z*),—*propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. *Propter honoris respectum*; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may excuse himself as exempted by law (*a*).

monds, 4 B. & Ald. 471. If any exception lies to the coroners, the jury is to be arrayed by two clerks of the court, or two persons of the county named by the court and sworn. These are called *elisors* or electors, and no challenge is allowed to their array, 3 Bl. Com. 354; Fortesc. de Laud. LL. c. 25; Co. Litt. 158.

(*r*) 3 Bl. Com. 354; et vide sup. vol. II. p. 647.

(*s*) Cod. 3, l. 16; Decretal. l. 2, t. 28, c. 36.

(*t*) L. 5, c. 15.

(*u*) L. 6, c. 37.

(*x*) Co. Litt. 294.

(*y*) Vide sup. vol. II. p. 482.

(*z*) Co. Litt. 156 b.

(*a*) 6 Geo. 4, c. 50, s. 2. It has been doubted whether, since the peerage has been thus made matter of *exemption*, it is any longer matter

[2. *Propter defectum;* as if a juryman be an alien born, this is defect of birth (*b*):] in connection with which we may notice the defect of sex,—no female being capable of serving on a jury (*c*). [But the principal deficiency is defect of estate sufficient to qualify a man to be a juror.] This formerly depended on a variety of statutes (*d*), but now on the 6 Geo. IV. c. 50, alone. By this statute the qualification of a juror, generally, is as follows: He must be between twenty-one and sixty years of age; and must have within the county in which he resides, and in which the action is to be tried, in his own name, or in trust for him, 10*l.* by the year above reprises, in lands or tenements of freehold, copyhold, or customary tenure, or of antient demesne; or in rents issuing out of such lands or tenements; or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or he must have within the same county 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or he must be a householder,

of *challenge* by the parties. (See Arch. Pr. by Chitty (8th ed.), p. 424.) But it is apprehended that this cannot take away their right of challenge.

(*b*) 6 Geo. 4, c. 50, s. 3. See as to the challenge of *alienage* to a special juror, R. *v.* Sutton, 8 B. & C. 417.

(*c*) Except in the case of a jury of matrons, upon the writ *de ventre inspiciendo.* (6 Geo. 4, c. 50, s. 1, and 3 Bl. Com. 362.) As to this writ see Wycherley's case, Car. & P. 262.

(*d*) It appears from Blackstone (3 Bl. Com. 362), that by the statute of Westminster the second, 13 Edw. 1, c. 38, the general qualification for juries in assizes was 20*s.* by the year, which was increased to 40*s.* by 21 Edw. 1, st. 1, and 2 Hen. 5, st. 2, c. 3. This was doubled by 27 Eliz. c. 6, which required an estate of foeehold, to the yearly value of 4*l.* at the least. But the value of money greatly decreasing, the qualification was raised by a temporary Act, (16 & 17 Car. c. 3,) to 20*l.* per annum, and on the expiration of that Act was afterwards fixed by 4 & 5 W. & M. c. 24, at 10*l.* per annum, and 6*l.* in Wales, of freehold land or copyhold; which was the first time that copyholders were allowed to serve on juries in the superior courts. In addition to which, it was afterwards provided, by 3 Geo. 2, c. 25, that any leaseholder for 500 years absolute, or any term determinable on a life or lives, of the clear yearly value of 20*l.* over and above the rent, should be qualified.

rated or assessed to the poor rate, or to the inhabited house duty, in Middlesex, on a value of not less than 30*l.*, or (in any other county), on a value of not less than 20*l.*; or he must occupy a house containing not less than fifteen windows (*e*). And the want of any such qualification is a ground of challenge (*f*). 3. [Jurors may be challenged *propter affectum;* for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour;*] the distinction between which has been already explained in reference to challenges to the array. As regards challenges to the polls, it is laid down as a cause of principal challenge—[that a juror is of kin, to either party, within the ninth degree (*g*); that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him]: and that, on the other hand, challenges to the favour,—are where the objection is founded on [some probable circumstances of suspicion, as acquaintance and the like (*h*).] Challenges of either kind

(*e*) 6 Geo. 4, c. 50, s. 1. This last qualification had reference to the window tax, since abolished. As to the qualifications prescribed by this Act, it is to be observed, that they apply not only to juries impanelled to try issues, (whether out of the superior courts or out of the new county courts,) but also to jurors on writs of inquiry before sheriffs. They do not apply, however, to the jurors in towns corporate, or counties corporate, possessing jurisdictions of their own; the panels of whose juries are to be prepared in manner before accustomed (6 Geo. 4, c. 50, s. 50); and as to *London* jurors, returned to try issues out of the superior courts, the Act provides a different qualification, viz. that a juror must be a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade or commerce, within the city; and have lands, tenements or personal estate of the value of 100*l*, (Sect. 50.)

(*f*) 6 Geo. 4, c. 50, s. 27.

(*g*) See Onions *v.* Nash, 7 Price, 263; Hewit *v.* Ferneley, ibid. 234.

(*h*) Finch, L. 401. It is remarkable that in the *nembda* or jury of the antient Goths, there was a distinction similar to ours, as to the nature of the challenges: "*Licebat palam excipere, et semper ex probabili causa tres repu-*

are determined, like those to the array, by *triors*; the practice as to whom, in the case of challenges to the polls, is stated as follows. [The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man, and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest (*i*). 4. Challenges *propter delictum*, are for some crime or misdemeanor that affects the juror's credit and renders him infamous];—as for an attainder of treason or felony,—unless he shall have obtained a free pardon,—or for outlawry or excommunication (*k*).

Besides these challenges (*l*), which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matters of *exemption*; whereby their service is *excused*, and not *excluded*. These exemptions formerly depended on various statutes, customs, and charters; but now depend on the 6 Geo. IV. c. 50, alone. The persons exempted are as follows; all peers; judges of the superior courts; clergymen; Roman Catholic priests; dissenting ministers, whose place of meeting is duly registered, and who follow no secular occupation but

diari; etiam plures ex causa prægnanti et manifesta."—Stiern. l. 1, c. 4.

(*i*) Co. Litt. 158. It is said that a principal challenge to the poll may, like a principal challenge to the array, be tried by the *court*, without the intervention of triors. Arch. Pr. by Chitty (8th edit.), p. 428.

(*k*) 6 Geo. 4, c. 50, s. 3,

(*l*) It is to be observed, that the case of a formal challenge, whether to the array or the polls, has now become infrequent; for where the sheriff is not indifferent, the jury may be impanelled in the first instance by the coroner; and supposing it to be impanelled by the sheriff, this will be a sufficient ground not only for challenge, but for moving in arrest of judgment after the verdict. (Arch. Pr. by Chit. (8th edit.), p. 422.) So in case of any objection to a particular juror, the usual course now is, simply to intimate the objection to the proper officer of the court; who, unless the matter be disputed on the other side, will refrain from calling him. So that the learning of challenges, in civil cases at least, (though still of importance,) is rarely illustrated by the modern practice of the courts.

that of schoolmaster; serjeants, barristers, and advocates, actually practising; attorneys, solicitors, and proctors, actually practising, and taking out their certificates; officers of all courts of law or equity, or of ecclesiastical or admiralty jurisdiction, actually exercising their duties; coroners, gaolers, and keepers of houses of correction; physicians, surgeons, and apothecaries, duly admitted to practise, and practising; officers of the royal army or navy, on full pay; licensed pilots and masters of vessels in the buoy or light service, duly licensed; servants of the royal household; officers of customs and excise; sheriffs' officers; high constables; and parish clerks (*m*).

If a sufficient number of jurors do not appear, or if by means of challenges or exemptions a sufficient number of unexceptionable ones do not remain, either party may pray a *tales*. [A tales is a supply of *such* men as are summoned upon the panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff, at common law.] But now at the assizes, or sittings at nisi prius, the judge is empowered, by the 6 Geo. IV. c. 50, s. 37, at the request of either party, to award a tales *de circumstantibus* (*n*); that is, to command the sheriff to return so many other men duly qualified as shall be present, or can be found, to the number required for making up a full jury; and to add their names to the former panel. But in the case of common jurors, (of whom seventy-two are usually returned on the same common jury panel (*o*),) it happens of course but rarely, that the whole are exhausted so as to make a tales necessary; and in special jury causes, the deficiency is, by the same statute, directed to be made up from the common jury panel, if a sufficient number can be found. But if such number be not found, there is then to be a tales *de circumstantibus*, in manner before directed (*p*).

(*m*) 6 Geo. 4, c. 50, s. 2.

(*n*) F. N. B. 166; Reg. Brev. 179.

(*o*) Vide sup. p. 591.

(*p*) 6 Geo. 4, c. 50, s. 37. As to a tales in a special jury cause, see Gatliff *v.* Bourne, 2 M. & Rob. 100;

The necessary number of twelve qualified persons being at length obtained, they are then separately sworn upon the New Testament (q), "well and truly to try the issue between the parties, and a true verdict to give according to the evidence;" and hence they are denominated the "jury," *jurata*, and the "jurors," *juratores* (r).

[The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, *the pleadings are opened* to them] on the part of the plaintiff; and, (as a general rule,) the case then stated [by counsel on that side which holds the affirmative of the question in issue (s). For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question (t); in which our law agrees with the civil (u): "*ei incumbit probatio, qui*

Snook *v.* Southwood, 1 R. & M. 429. *Contra*, British Museum *v.* White, 3 Car. & P. 289. It is provided by 15 & 16 Vict. c. 76, s. 113, that where notice has not been given that a cause is to be tried by special jury, it may be tried by a common jury from the panel of common jurors.

(q) This applies only to persons professing the Christian religion, and not proposing to be sworn in a different manner. As to others, vide post, pp. 608, 609.

(r) Blackstone remarks that the *selecti judices* of the Romans bore in many respects a remarkable resemblance to our juries,—"for they were "first returned by the prætor; then "their names were drawn by lot, till "a certain number was completed; "then the parties were allowed their "challenges; next they struck what "we call a tales; lastly, the judges, "like our jury, were sworn." (Ascon. in Cic. Verr. 1, 6; 3 Bl. Com. 366.) He also remarks that a learned writer of our own, Dr. Pettingall, hath shown, in an elaborate work (published A.D. 1769), so many resemblances between the δικασταί of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former. As to the derivation of our juries, however, vide sup. p. 587, n. (y).

(s) In all actions for *unliquidated damages*, the plaintiff shall begin, though the affirmative of the issue is on the defendant. See Mercer *v.* Whall, 5 Q. B. 447; Cooper *v.* Wakley, Moo. & M. 248; Arch. N. P. p. 4.

(t) Calder *v.* Rutherford, 3 Brod. & Bing. 302; Evans *v.* Birch, 3 Camp. 10. But there are cases in which the law presumes the affirmative; and where consequently the negative must be proved by the party asserting the negative. See Williams *v.* East India Company, 3 East, 192.

(u) Ff. 22, 3, 2; Cod. 4, 19, 23.

[*dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit.*" The opening counsel briefly informs them what has been transacted in the action], up to that stage of its prosecution; [the parties, the nature of the action, the declaration, the plea, replication, and other proceedings; and, lastly, upon what point the issue is joined, which is there sent down to be determined (*v*). The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and when their evidence is gone through,] and in some cases summed up also (*w*), [the advocate on the other side opens the adverse case, and supports it,] if its nature so require, [by evidence;] which he is also entitled to sum up; [and then the party which began, is heard by way of reply.] But no reply is allowed unless evidence be given in answer to the case first stated (*x*).

The nature of the present work is not adapted to a full disquisition on the numberless niceties and distinctions which attend the law of evidence (*y*). We must confine ourselves to a few observations on the nature of evidence in general, and a notice of some of its leading rules and maxims.

Proofs, or evidence, (for the terms are generally used as synonymous,) are either *written* or *parol*. The former con-

(*v*) Blackstone remarks (vol. 3, p. 367), that "instead of this formerly the whole record and process "of the pleadings" (then in Latin) "were read to the jury in English "by the court, and the matter in "issue clearly explained to their "capacities."

(*w*) By 17 & 18 Vict. c. 125, s. 18, it is provided, that "the party "who begins, or his counsel, shall "be allowed, in the event of his "opponent not announcing at the "close of the case of the party who "begins, his intention to adduce "evidence, to address the jury a "second time at the close of such "case, for the purpose of summing "up the evidence; and the party on "the other side, or his counsel, shall "be allowed to open the case, and "also to sum up the evidence (if "any); and the right to reply shall "be the same as at present."

(*x*) There is an exception however to this, in the case of the Crown, which is always entitled to reply.

(*y*) There exists several excellent treatises on this subject; those of Mr. Phillips, of Mr. Starkie, and of Mr. Pitt Taylor, may be consulted with advantage.

sist of records, deeds, or other writings (z); the latter of witnesses personally appearing in court, and sworn (a) to the truth of what they depose.

With respect to witnesses, [there is a process to bring them in by writ of *subpœna ad testificandum* (b); which commands them, laying aside all excuses, and on pain of forfeiting 100*l*., to appear at the trial, and give their evidence. And it may contain a clause of *duces tecum*; requiring them to bring, at the same time, all such deeds or writings in their possession or power, as the party who issues the subpœna may think material for his purpose. In the event of the non-attendance of a person so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court; and is liable to an attachment, (a species of criminal process,) under which he may be punished for such contempt. And an action will also lie against him, at suit of the party grieved, to recover compensation for any loss that may be occasioned by the non-attendance (c). [But no witness, unless his reasonable expenses] for the whole period of his attendance, *eundo, morando, et redeundo*, [are tendered him, is bound to appear at all: nor if he appears, is he bound to give evidence till such charges are actually paid him;]

(z) As to the admissibility in evidence of letters of an agent, Jones v. Shears, 4 A. & E. 832; of entries in parish books, Taylor v. Devey, 7 A. & E. 409; of an antient survey of manor, ibid. 617; of books of treasurer of charity, Doe v. Hawkins, 2 Q. B. 212; of judgments, Christy v. Tancred, 9 Mee. & W. 438; of public books not judicial, Jewison v. Dyson, ibid. 540; Rowe v. Brenton, 8 B. & C. 743; of title deeds, Wollaston v. Hakewill, 3 Man. & Gr. 297.

(a) As to the *swearing*, vide post, p. 608.

(b) By 17 & 18 Vict. c. 34, a *subpœna* may now be had to compel the attendance of witnesses *from any part of the united kingdom.*

(c) An action will also lie on the stat. 5 Eliz. c. 9, to recover a penalty of 10*l*. at the suit of the party grieved. But this proceeding is not an usual one. As to the action at common law, for non-attendance, see Davis v. Lovell, 1 Horn & Hurl. 451; Couling v. Coxe, 6 D. & L. 399. As to attachment for non-attendance, Scholes v. Hilton, 10 Mee. & W. 15; Chapman v. Davis, 1 Dowl. N. S. 239.

and he is also protected during the same period from any arrest for debt (*d*). If it be ascertained beforehand that a person required as a witness, will be unable to attend the trial from permanent sickness or infirmity, or absence in parts beyond the court's jurisdiction, the court is empowered by 1 Will. IV. c. 22 (*e*), after joinder of issue, to issue a commission for his examination at any place out of the jurisdiction, or to order his examination upon interrogatories or otherwise, at any place within the jurisdiction, (as the case may require): and such examination may afterwards be read in evidence at the trial, provided the witnesses be dead, or (in case of sickness or infirmity) provided his disability still continues; but otherwise not without consent of the party against whom it is offered (*f*). So, also, if it be thought desirable by either party with a view to his case at the trial,—he is enabled by 17 & 18 Vict. c. 125, ss. 50, 51, to obtain an order for the disclosure and production, by the opposite party, of any document in his possession or power, (unless he can show some sufficient objection to its production (*g*)); and also, by leave

(*d*) See Meekins *v.* Smith, 1 H. Bl. 636, where it was laid down that the same privilege of exemption from arrest applied *to all* persons, (whether witnesses or not,) who had *bona fide* occasion to attend.

(*e*) This statute recites and extends the provisions of a previous act (13 Geo. 3, c. 63), which had reference to *India* only.

(*f*) 1 Will. 4, c. 22, s. 10. As to commissions to examine witnesses, see Clay *v.* Stephenson, 7 A. & E. 185; Greville *v.* Stultz, 17 L. J. (Q. B.) 14; R. *v.* Wood, 7 Mee. & W. 571; Mondel *v.* Steele, 8 Mee. & W. 300; Attorney-General *v.* Bovet, 15 Mee. & W. 60; Finney *v.* Beasley, 17 Q. B. 86. And see 6 & 7 Vict. c. 82, ss. 5, 6, as to the powers with which the commissioners are vested, and 1 Reg. Gen. Hil. T. 1853, r. 33, as to filing the depositions. This proceeding cannot be resorted to in a *criminal* prosecution either at common law or under the above statute. Queen *v.* Inhabitants of Upton St. Leonards, 10 Q. B. 827. We may take occasion to remark here, that by a recent statute of 19 & 20 Vict. c. 113, an order may now be obtained from the court or a judge for the examination of witnesses in England, whose testimony is required in *foreign* courts, before which any civil or commercial matter is pending.

(*g*) See, as to this provision Forshaw *v.* Lewis, 10 Exch. 712; Scott *v.* Zygomald, 4 Ell. & Bl. 483; Herschfeld *v.* Clarke, 11 Exch. 712; Smith *v.* Great Western Railway

of the court or a judge, may deliver to the opposite party or his attorney *interrogatories* in writing, in order to obtain from him a discovery of such matters as are material to the action or defence respectively (*h*).

[All witnesses, that have the use of their reason (*i*), are to be received and examined.] To this, indeed, there were formerly some exceptions. For no party to the suit was allowed, in any case, to give evidence; and persons that were *infamous*, that is, of such character that they might be challenged as jurors *propter delictum* (*j*), were wholly inadmissible as witnesses; and persons *interested* in the testimony they were to give, (however slight that interest might be (*k*),) were also incompetent to be heard as witnesses on the side of the question to which their interest inclined (*l*). But the principle of absolute exclusion in these cases, though once among the most settled pecu-

Company, 6 Ell. & Bl. 405. We may notice also here the antecedent provision of 14 & 15 Vict. c. 99, s. 6, making either party compellable, in any action or proceeding at law, to allow the other an *inspection* of all documents relating to the action or proceeding. On this, see the following cases: Pepper *v.* Chambers, 7 Mee. & W. 226; Sneider *v.* Mangino, ibid. 229; Hill *v.* Philp, ibid. 232; Hunt *v.* Hewitt, ibid. 236; Scott *v.* Walker, 2 Ell. & Bl. 555; Doe *d.* Avery *v.* Longford, 1 B. C. C. 37; Riccard and others *v.* The Inclosure Commissioners, 24 L. J., N. S., Q. B. 49.

(*h*) See as to this provision, Martin *v.* Hemming, 10 Exch. 478; Osborn *v.* The London Dock Company, ibid. 698; James *v.* Barnes, 17 C. B. 596; May *v.* Hawkins, 11 Exch. 210; Flintcroft *v.* Fletcher, ibid. 543; Edwards *v.* Wakefield, 6 Ell. & Bl. 462; Whateley *v.* Crouter, ibid. 709; Croomes *v.* Morrison, ibid. 984; Chester *v.* Wortley, 17 C. B. 410; 18 C. B. 239; Russell *v.* Dodd, 5 W. R., B. C., 267; Tetley *v.* Easton, 18 C. B. 643.

(*i*) A child, however, too young to understand the nature of an oath, or an adult unable, from mental infirmity, to understand it, is incompetent, 1 Stark. Ev. 81.

(*j*) 3 Bl. Com. 370. As to this challenge, vide sup. p. 601.

(*k*) See Doe *v.* Bramwell, 3 Q. B. 307.

(*l*) A few exceptions had been introduced by statute, in particular cases: see 11 Ann. st. 1, c. 18, s. 13; 13 Geo. 3, c. 78, s. 77; 9 Geo. 4, cc. 32, 33. Counsel were allowed to ascertain whether a witness, called by the opposite side, was or was not competent, by examining him on the *voire dire* (*dicere veritatem*), as it was called, before he gave his evidence. See Arch. Nisi Prius, vol. i. p. 38.

liarities of the English law, has been eradicated from it by recent acts of parliament; and the objection is now admissible only as affecting the *credibility*, and not the *competency*, of the witness: it being in the first place provided by 6 & 7 Vict. c. 85, that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence either in person or by deposition, on any issue or inquiry civil or criminal; but shall be admitted notwithstanding he may have an interest in the matter in question, or in the event of the trial or proceeding, and notwithstanding that he may have previously been convicted of any crime or offence (*m*);—and it being now further enacted by 14 & 15 Vict. c. 99, that even the parties to a cause shall be both competent and compellable to give evidence on behalf of either or any of the parties; subject only to exception where the question tends to criminate the person examined; or where it is put in any action for breach of promise of marriage, or any action or proceeding instituted in consequence of adultery;—and by 16 & 17 Vict. c. 83, that the husband or wife also of any party shall be in the same position, in this respect, as the party, subject only to the exceptions following—that the husband and wife cannot give evidence for or against each other in criminal proceedings, or proceedings in consequence of adultery; and that they cannot be compelled to disclose matters which they have learned by communication from each other during marriage (*n*).

The oath, (which is to speak "the truth, the whole truth, and nothing but the truth,") is administered to witnesses in general upon the New Testament; but to the believers in other religions than the Christian, in the forms appropriate to their creed (*o*). By 1 & 2 Vict. c. 105, however, it is declared

(*m*) See Udal *v.* Walton, 14 Mee. & W. 254; Att.-Gen. *v.* Hitchcock, 1 Exch. 91.

(*n*) Vide sup. vol. II. pp. 258, 259, n. (*r*).

(*o*) Omichund *v.* Barker, 1 Atk. 49. An *atheist* is said not to be a competent witness; but see 1 & 2 Vict. c. 105, above cited, which seems to make this doubtful.

and enacted, that in all cases in which an oath is administered to any person on any occasion whatever, it will bind him, provided it be administered in such form and with such ceremonies as he may declare to be binding; and by 17 & 18 Vict. c. 125, s. 20, if any person called as a witness shall be unwilling from alleged conscientious motives to be sworn, the court, upon being satisfied of the sincerity of the objection, shall permit him to substitute his solemn affirmation (*p*). But both the enactments last mentioned are subject to the proviso that, upon a false statement of fact, the witness may be convicted of perjury, as well as if he had been sworn to it, in the form and with the ceremonies commonly adopted.

A witness is not bound to answer any question that tends to expose him to punishment as a criminal or to penal liability (*q*), or to forfeiture of any kind (*r*). But by 46 Geo. III. c. 37, it is declared and enacted, that he cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he *owes a debt*, or is otherwise subject to a *civil* suit. So, also, upon the general principle of the convenience of public justice, no questions are permitted to be asked which tend to the discovery of the channels through which information has been given to the officers of justice in criminal prosecutions (*s*).

A counsel, attorney, or solicitor (*t*) is not bound or even

(*p*) An *affirmation* is also allowed in lieu of oath, on all occasions, in the case of Quakers, Moravians and Separatists. See 3 & 4 Will. 4, c. 49, s. 82; 1 & 2 Vict. c. 77; 6 & 7 Vict. c. 85, s. 2.

(*q*) Stark. Ev. 136. And see 14 & 15 Vict. c. 99, s. 3.

(*r*) Phill. on Evidence, vol. 2, p. 420. See Boyle *v.* Wiseman, 10 Exch. 647; Fisher *v.* Ronalds, 12 C. B. 762.

(*s*) Hardy's case, 44 St. Tr. 816; Attorney-General *v.* Briant, 15 Mee. & W. 169.

(*t*) Rex *v.* Duchess of Kingston, 11 St. Tr. 246; Wilson *v.* Rastall, 4 T. R. 753; Cromack *v.* Heathcote,

at liberty to divulge the secrets of the cause with which he may have become confidentially intrusted; nor can official persons be called upon to disclose any matter of state, the publication of which may be prejudicial to the community (u). But the law recognizes no other privilege in this matter; and compels all other professional persons, whether physicians, surgeons, or divines, to divulge the secrets (if relevant to the issue) with which they have become professionally acquainted: and will not allow even a servant or private friend to withhold a relevant fact, though of the most delicate nature, and communicated to him in the strictest confidence (v).

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness in the opinion of the judge prove adverse, contradict him by other evidence; or, by leave of the judge, prove that he has made, at some other time, a statement inconsistent with his present testimony. In order, however, to protect the witness in such case against unfair surprise, it is necessary, before such proof be given, that the circumstances of the supposed former statement, so far as sufficient to designate the particular occasion, should be mentioned to him; and that he should be asked whether or not he has made such statement (x).

[One witness, if credible, is *sufficient* evidence to a jury, of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testi-

2 Brod. & Bing. 4; Bramwell v. Lucas, 2 B. & C. 745; Griffith v. Davies, 5 B. & Ad. 502; Marston v. Downes, 1 A. & E. 31; Doe v. Seaton, 2 A. & E. 171; Turquand v. Knight, 2 Mee. & W. 98; Doe v. Watkins, 3 Bing. N. C. 421; Weeks v. Argent, 16 Mee. & W. 817; Volant v. Soyer, 22 L. J., C. P. 83; Brown v. Foster, 3 Jur. (N. S.) 245, Exch. As to the case of a *trustee*, see Davies v. Waters, 9 Mee. & W. 608.

(u) See Taylor on Evidence, p. 761, 2nd edit.

(v) Wilson v. Rastall, ubi sup.; Rex v. Duchess of Kingston, ubi sup.; Valliant v. Dodemead, 2 Atk. 524.

(x) 17 & 18 Vict. c. 125, s. 22.

[mony of two, as the civil law universally requires. "*Unius responsio testis omnino non audiatur* (y)."]

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*, he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, in reference to any matters suggested by the cross-examination (z). The evidence he has given thus passes through a close and severe scrutiny, while on the other hand it receives all the support and protection which the interests of justice require.

The object of the cross-examination, it should be observed, may not only be to obtain new facts not before elicited, but to impeach the character of the witness for veracity. He may therefore be asked if he has not given a contrary account of the same matter on a former occasion, and if he does not distinctly admit this, proof may then be given, *aliunde*, that he has done so (a). But the law in this case, also, makes the same proviso for his protection as in the case where he is interrogated as to former statements, by the party producing him (b); and makes besides this further proviso, that if it is intended to con-

(y) Cod. 4, 20, 9. Blackstone remarks here (vol. iii. p. 370) upon the qualification with which this rule is followed by our modern civilians. "As they do not allow a less "number than two witnesses to be "*plena probatio*, they call the testi"mony of one, though never so "clear and positive, *semiplena pro*"*batio*, only, on which no sentence "can be founded. To make up "therefore the necessary comple"ment of witnesses, when they have "one only to a single fact, they ad"mit the party himself (plaintiff or "defendant) to be examined in his "own behalf, and administer to him "what is called the *suppletory* oath,—"and if his evidence happens to be "in his own favour, this immediately "converts the half proof into a whole "one." Our law has always taken and still takes a very different course. It allows one witness to suffice as stated in the text; and as to the evidence of the parties to the suit used formerly to reject it altogether, though by 14 & 15 Vict. c. 99, they are now competent and compellable to be examined.

(z) As to cross-examination and re-examination, vide Prince v. Samo, 7 A. & E. 627.

(a) 17 & 18 Vict. c. 125, s. 23.

(b) Vide sup. p. 610.

tradict him by his former statement in *writing*, his attention must, before the contradictory proof be given, be called to those parts of the writing which are to be used for the purpose of contradiction (c). Evidence may also be offered to prove that he has been convicted of perjury or the like; or, generally, that he is of such a character as not to deserve to be believed upon his oath. But no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the jury, and not only perplex the administration of justice, but put the witness himself to the unfair disadvantage of being assailed on charges of which he had no previous notice (d). He may, however, be questioned as to whether he has been convicted of any felony or misdemeanor; and if he denies the fact or refuses to answer, the conviction may be proved (e).

The nature of the evidence itself, whether obtained from witnesses, or from written instruments, is the next point that naturally presents itself for consideration; and the main principles of the law connected with this subject, shall here be briefly stated.

First, then, we may remark, that no evidence is necessary, as to matters of which the court will take judicial notice, as of the existence of a war in which the country is engaged, and which has been publicly proclaimed, or recognized in acts of parliament (*f*); or of matters which

(c) 17 & 18 Vict. c. 125, s. 24.

(d) 1 Stark. Ev. 145. See Queen's case, 2 Brod. & Bing. 299; Spencely v. De Willott, 7 East, 108; Carpenter v. Wall, 11 A. & E. 803.

(e) 17 & 18 Vict. c. 125, s. 25. By the same section a certificate containing the substance and effect only of the indictment and conviction, purporting to be signed by the clerk of the court or other proper officer shall, upon proof of the identity of the person, be sufficient evidence of the conviction without proof of the signature or official character of the person appearing to have signed.

(*f*) See R. v. Beranger, 3 M. & S. 67. See Russell v. Dickson, 6 Bing. 442; Brune v. Thompson, 2 G. & D. 110; Alcinous v. Nigreu, 4 Ell. & Bl. 217. As to the admission, without proof, of acts of state, judicial proceedings, and the like, and of certain official documents, purporting to be genuine, vide 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, ss. 7—14; c. 100, s. 22.

the law presumes, as that a man is innocent till the contrary be shown,—that all official acts have been done in due form; or that a man proved to have been in existence at such a period, that, having regard to his age at that period, he would not now have passed the probable limits of longevity, and of whose subsequent circumstances nothing is known,—is still in existence (*g*). Nor is evidence in general necessary, with respect to matters which the opposite party has admitted to be true (*h*): and it is of course always dispensed with, as to matters upon which an admission has been made for the express purpose of being used at the trial. And in reference to this subject we may remark, that by 15 & 16 Vict. c. 76, s. 117, either party may call on the other, by notice, to admit, for the purpose of the trial, any document, saving all just exceptions; and in case of refusal or neglect to do so, the costs of proving the document shall be paid by the party so called upon, whatever may be the result of the cause, unless at the trial the judge shall certify that the refusal to admit was reasonable; and on the other hand, no costs of proving any document, will, in general, be allowed to a party who neglects to give such notice (*i*).

Again, it is a fundamental rule, that no evidence is admissible except upon the point in issue (*k*). [Therefore, in an action of debt, where the defendant denies his bond, by

(*g*) See Doe *v.* Nepean, 5 B. & Ad. 86; S. C. (in error), 2 Mee. & W. 894; Sillick *v.* Booth, 1 You. & C. c. 117. As to the particular case of tenants for life, or *cestuy que vies*, see st. 19 Car. 2, c. 6; 6 Ann. c. 18.

(*h*) See Rex *v.* Gardner, 2 Camp. 513; Rex *v.* Topham, 4 T. R. 126; Brickett *v.* Hulse, 7 Ad. & E. 454. As to the effect of admissions implied *upon the pleadings*, by omitting to traverse a fact alleged or otherwise, see Digby *v.* Thompson, 4 B. & Ad. 821; Stracey *v.* Blake, 1 Mee. & W. 168; Bennison *v.* Davison, 3 Mee. & W. 179; Smith *v.* Martin, 9 Mee. & W. 304; Spencer *v.* Barough, ibid. 425; Bingham *v.* Stanley, 2 Q. B. 117; Gould *v.* Oliver, 2 Man. & G. 208.

(*i*) See also Reg. Gen. Hil. T. 1853, (Pr.) rr. 29, 30. As to *notice to admit*, see also Reg. Gen. Hil. T. 1853, (Pr.) rr. 29, 30, and Lush, Pr. p. 364, 2nd edit.

(*k*) 3 Bl. Com. 367; B. N. P. 298; Hey *v.* Moorhouse, 6 Bing. N. C. 52.

[the plea that it is not his deed, and the issue is whether it be the defendant's deed or no,—he cannot give a release of this bond in evidence; for that does not destroy the bond,] but shows only that it is discharged; and therefore does not support his side of the issue, which is the allegation that the bond alleged against him, is not his deed. Instead of such a plea, he should have pleaded the release.

Another rule of the same general nature is, that none but the best evidence shall be adduced (*l*); by which we are to understand, that that which is of a secondary, shall not be substituted for that which is of a primary kind, where the primary evidence is accessible; a rule founded on the presumption that such a substitution is probably prompted by some sinister motive. Thus it is inflexibly held, that the contents of no *private* deed or writing, (as distinguished from a record or other public document (*m*),) can be proved by a copy (still less by mere oral evidence), if the writing be in existence, and can be procured by the party by whom the proof is offered,—but the writing itself must be produced (*n*); and if there be occasion to prove its execution by a witness, (a proof that the law in general requires, unless it be thirty years old, and come out of the possession of some person naturally entitled to the custody (*o*),) this could only be done, as the law until recently stood, by calling the particular person (if any) whose name was thereon written as attesting the execution (*p*); or by

(*l*) 3 Bl. Com. 368. See Taylor on Evidence, p. 340—368, 2nd edit.

(*m*) See 14 & 15 Vict. c. 99, s. 7. As to the *subpœna* to produce an original record, see Reg. Gen. Hil. T. 1853, (Pr.) r. 32.

(*n*) M'Gahey *v.* Alston, 2 Mee. & W. 206; Jones *v.* Tarleton, 9 Mee. & W. 675; Howard *v.* Smith, 3 Man. & Gr. 254; Queen *v.* Llanfaethly, 2 Ell. & Bl. 940. We may remark here, that by 17 & 18 Vict. c. 125, s. 87, the court or a judge may order, in an action on a bill of exchange or other negotiable instrument, that the loss of it shall not be set up at the trial, provided an indemnity is given to the satisfaction of the court, or judge, or a master, against the claims of any other person.

(*o*) B. N. P. 255; 2 Phill. on Ev. 203; Doe *d.* Neale *v.* Samples, 8 A. & E. 151.

(*p*) Gillott *v.* Abbott, 7 A. & E. 783; Poole *v.* Warren, 8 A. & E. 582; Collins *v.* Bayntum, 1 Q. B.

calling one of them at least, if there were several; or by proving that such attesting witnesses are all dead or otherwise incapable of giving their testimony (q), and then adducing secondary evidence of the execution, as by proof of the handwriting to one or more of their signatures (r). And so strict was this rule in its nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not suffice to excuse the absence of the attesting witness (s). But the law in this respect has now undergone a very important change: for by 17 & 18 Vict. c. 125, s. 26, it shall in future not be necessary to prove by the *attesting witness* any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

On the other hand, however, it is held that there are no degrees in secondary evidence; but that where the circumstances are such as to excuse a party from giving the proper or primary proof, he is at liberty to resort to any species of secondary evidence within his power (t). Thus, where the defendant is let into secondary evidence of the contents of a letter,—by showing that the letter itself is in the possession of the plaintiff, who has had notice to produce it in court (u), but fails to do so,—the defendant

117; Whyman v. Garth, 8 Exch. 803. The declaration of a subscribing witness, that he had forged the deed, is not admissible. Stobart v. Dryden, 1 M. & W. 615.

(q) Adams v. Kerr, 1 B. & P. 360; Crosby v. Percy, 1 Taunt. 364; Ward v. Wells, ibid. 461; Swire v. Bell, 5 T. R. 371.

(r) Nelson v. Whittall, 1 B. & Ald. 19; Doe v. Wainwright, 5 A. & E. 520; Brown v. Thornton, 6 A. & E. 185; R. v. Koops, ibid. 198; Doe v. Heakin, ibid. 495; Doe v. Mew, 7 A. & E. 240; Doe d. Edward v. Gunning, ibid. 243; M'Gahey v. Alston, 2 Mee. & W. 206; Falmouth (Earl) v. Roberts, 9 Mee. & W. 496; Lloyd v. Mostyn, 10 Mee. & W. 478.

(s) Abbott v. Plumbe, 1 Doug. 216; R. v. Harringworth, 4 M. & S. 354.

(t) Doe v. Ross, 7 Mee. & W. 102.

(u) As to a *notice to produce* and

is then at liberty to give *oral* evidence of its contents; and is not bound to produce a *copy*, though in fact he should have kept one (*x*).

Another principal rule is, that *hearsay* evidence, that is, evidence of what has been said or declared out of court, by a person not party to the suit, is not admissible. For our law deems it unsafe to rely upon the assertions of any person, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and the check which the power of cross-examination imposes (*y*). And this rule is so absolute, that the death of the person by whom the statement was made, and the consequent impossibility of producing him as a witness, makes no difference. Upon the same principle no written entry or memorandum, made by a person not party to the suit, can in general be admitted as evidence even after his death between the plaintiff and defendant, for this falls under the same consideration, and is in effect not distinguishable from hearsay evidence.

The rejection of hearsay is subject, however, to exception in particular cases. For, first, the declaration of a third person is in certain instances admitted as forming part of the *res gestæ*, or as deriving particular credibility from the circumstances under which it was made. Thus, if a question arises, whether a third person committed an act of bankruptcy, by absenting himself from his house, his own declaration made at the time, that he did so to avoid a creditor, is good evidence (*z*). So the books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money; because such acknowledgments, having been made

the manner of proving it, see 15 & 16 Vict. c. 76, s. 119; Lush, Pr. p. 366, 2nd edit.

(*x*) Brown *v.* Woodman, 6 Car. & P. 206, per Parke.

(*y*) Wright *v.* Doe, 7 A. & E. 384; Stobart *v.* Dryden, 1 Mee. & W. 615.

(*z*) 1 Stark. Ev. 48.

against their own interest, are entitled on that ground to peculiar weight (*a*). Again, declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, custom, boundary, and the like (*b*). To which we may add, as another exception from the general rule, that a statement made by a third person will be receivable as evidence against the plaintiff or defendant in the cause, if the plaintiff or defendant be proved to have been present when the statement was made, and to have heard its import; for it then becomes material to consider whether, by his language or demeanor on the occasion, it appeared to receive his assent (*c*).

Lastly, we may notice as a further rule of evidence, so far as written instruments are concerned, (and one of recent introduction,) that where the genuineness of a writing is disputed, it may be proved genuine or otherwise, by witnesses speaking on *comparison* of it with any other writing proved to the satisfaction of the judge to be genuine (*d*).

These rules relate to the *admissibility* of evidence in different cases (*e*). As to its *effect*, we may remark in general, that it may be either *positive* or *circumstantial* (*f*); by the former of which, we commonly understand a proof of the very fact in question; by the latter, a proof of circumstances from which, according to the ordinary course of human affairs, the existence of that fact may reason-

(*a*) Higham *v.* Ridgeway, 10 East, 109; Doe *v.* Coulthred, 7 A. & E. 235; Percival *v.* Nanson, 7 Exch. 1. As to entries against interest, see 2 Smith's Leading Cases, 193; Fursdon *v.* Clogg, 10 Mee. & W. 574.

(*b*) Davies *v.* Lowndes, 5 Bing. N. C. 161; Thomas *v.* Jenkins, 6 A. & E. 525; Barraclough *v.* Johnson, 8 A. & E. 99; Brisco *v.* Lomax, ibid. 198; Doe *v.* Hawkins, 2 Q. B. 212; Bradley *v.* James, 13 C. B. 822.

(*c*) 1 Stark. Ev. 50.

(*d*) 17 & 18 Vict. c. 125, s. 27.

(*e*) As to the objection to the proof of written instruments founded on the want or insufficiency of *stamp*, ubi sup. vol. I. p. 484, n. (*o*).

(*f*) 3 Bl. Com. 371. Blackstone defines circumstantial evidence as the proof of such circumstances as "*either necessarily* or *usually* attend the fact itself." Ibid.

ably be *presumed* (g). And the strength of circumstantial or presumptive evidence varies according to the nature and particular combination of the facts proved. It may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary; or it may be strong enough to prevail against evidence offered on the other side, or even so violent as not to admit of being repelled by any adverse evidence whatever, except under very particular circumstances.

Such are the general principles of law relative to the evidence; all which, it is to be observed, [is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders; and before the judge and jury; each party having liberty to except to its competency; which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. And if either in his directions or decisions he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal *a bill of excep-*

(g) It is to be observed that the presumptions here referred to are of a different kind from the presumptions *of law* before mentioned, (vide sup. p. 613,) which are in truth mere legal maxims in the abstract, on which, as on other points of law, the jury are to follow implicitly the direction of the judge. But the presumptions now in question, arise from special circumstances; and are inferences which in general the jury are at liberty to adopt or reject; though even here their discretion is in some instances controlled by precedent, or the manifest reason of the case. Thus we have legal decisions upon the sufficiency of the presumption of life under particular circumstances (vide the cases cited sup. 618, n. (g): of loss of ship, Green v. Brown, 2 Str. 1199; of seisin in fee, Jayne v. Price, 5 Taunt. 326; Doe v. Williams, 2 Mee. & W. 749; of death without issue, Doe v. Woolley, 8 B. & C. 22; Earl of Roscommon's case, 6 Clark & Fin. 97; of a reconveyance, Fenny v. Jones, 3 M. & Scott, 472; Doe v. Williams, 1 Mee. & W. 749; of unity of possession, Clayton v. Corby, 2 Gal. & D. 174; of authority as agent, Owen v. Barrow, 1 N. R. 101; Ward v. Evans, Salk. 442; of payment, Welsh v. Seaborn, 1 Stark. Rep. 474; Oswald v. Legh, 1 T. R. 270; R. v. Stephens, 1 Burr. 434; of payment by cheque, Egg v. Barnett, 3 Esp. 196; of due stamping, Doe v. Coombs, 3 Q. B. 637.

[*tions* (*h*), stating the point wherein he is supposed to err; and this he is obliged to seal by the statute of Westminster the second, 13 Edward I. c. 31; or if he refuses so to do, the party may have a compulsory writ against him (*i*), commanding him to seal it, if the fact alleged be truly stated; and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exception is in the nature of an appeal, examinable not in the court out of which the record issues for the trial at *nisi prius*,] but in a court of error, after judgment given in the court below (*j*). [But a *demurrer to the evidence* (*k*) shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact which has been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue (*l*); which draws the question of law from the cognizance of the jury to be decided (as it ought) by the court] above, or in *banc*. [But neither these demurrers to evidence, nor bills of exceptions,] particularly the former (*m*), [are at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

(*h*) As to a bill of exceptions, see Lush, Pr. p. 499, 2nd edit.; Davies v. Lowndes, 1 Man. & Gr. 473; Galway v. Baker, 5 Clark & Fin. 157; Doe v. Fisher, 2 Bligh, N.S. 9; Gibbs v. Pike, 1 Dowl. N. S. 409; R. v. Rowley, 2 Dowl. N. S. 335; Allen v. Hayward, 7 Q. B. 960; Newton v. Bootle, 16 L. J. (C. B.) 135; M'Alpine v. Magnall, 3 C. B. 496.

(*i*) Reg. Br. 182; 2 Inst. 487.

(*j*) Davenport v. Tyrrell, 1 W. Bl. 679.

(*k*) As to demurrer to evidence, see Arch. Pr. by Chitty, 429 (9th ed.); Fanshaw v. Cocksedge, 1 Doug. 119; S. C. in error, 3 Bro. P. C. 690; Cort v. Birkbeck, 1 Doug. 218; Gibson v. Hunter, 2 H. Bl. 187; Miller v. Warre, 4 B. & C. 538.

(*l*) Co. Litt. 72; 5 Rep. 104.

(*m*) A demurrer to the evidence may be said to have now fallen into *total* disuse.

[This open examination of witnesses *vivâ voce*, in the presence of all mankind, is much more conducive to the clearing up of truth (*n*) than the private and secret examination taken down in writing] by courts whose practice is modelled on the civil law; [where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own form and language; but he is here at liberty to correct and explain his meaning if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing, and read to the judge in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this English way of giving testimony *ore tenus:* which was also indeed familiar among the *antient* Romans, as may be collected from Quintilian (*o*), who lays down very good instructions for

(*n*) Hale, Hist. C. L. 254—256. (*o*) Instit. Orat. l. 5, c. 7.

[examining and cross-examining witnesses *vivâ voce*. And this, or somewhat like it, was continued as low as the time of Hadrian (*p*); but the civil law, as it is now modelled, rejects all public examination of witnesses.]

[When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury,] recapitulating in greater or less detail, as he may deem necessary, the statements of the witnesses, and the contents of the documents adduced on either side, commenting upon the manner in which they severally bear upon the issue, and giving his opinion upon any matter of law that may arise upon them, but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or defendant (*q*).

[The jury, after the proofs are summed up,] if they express a wish so to do, withdraw from the court [to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge (*r*), till they are

(*p*) See his epistle to Varus, the legate or judge of Cilicia; "*Tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus æstimationis sint; et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras extempore verisimilia responderint.*"— Ff. 22, 5, 3.

(*q*) Before the case is left to the jury, and in the progress of the trial, it often happens that an objection is taken either by the plaintiff or defendant, on the ground of some particular discrepancy between the allegations which the adverse party has made in his pleadings, and the evidence offered in support of his allegations. Such discrepancy upon a particular point, as distinguished from a total failure of proof upon the substance of the case, is called a *variance;* and objections founded on variances were formerly allowed to a very inconvenient extent; but by 9 Geo. 4, c. 15; 3 & 4 Will. 4, c. 42, ss. 23, 24; 15 & 16 Vict. c. 76, ss. 36, 37, 222; and 17 & 18 Vict. c. 125, s. 96, the court or a judge is now empowered to allow an amendment of all defects and errors whenever such amendments shall be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties.

(*r*) "A method of accelerating "unanimity," says Blackstone, "not

[all unanimously agreed (*t*).] Accordingly [if they eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict (*u*). Also, if they speak with either of the parties or their agents after they have gone from the bar, or if they receive any fresh evidence in private, or if, to prevent disputes, they cast lots for whom they shall find, any of these circumstances will entirely

"wholly unknown in other constitutions of Europe, and in matters "of greater concern. For by the "Golden Bull of the empire, if, after "the congress is opened, the electors "delay the election of a king of the "Romans for thirty days, they shall "be fed only with bread and water "till the same is accomplished." 3 Bl. Com. 375.

(*t*) "This necessity of a total unanimity seems to be peculiar to our "own constitution, (see Barring. on "the Stats. 19, 20, 21); or at least "in the *nembda*, or jury of the antient "Goths, there was required, even in "criminal cases, only the consent of "the major part; and in case of an "equality, the defendant was held to "be acquitted." Stiern. l. 1. c. 4.—3 Bl. Com. 376. With us the principle as to unanimity results, as a consequence, from the rule of requiring as many as twelve to concur, in connexion with that of admitting only twelve to sit upon the jury. The former originated in the regard antiently paid to this particular number (vide sup. p. 588, n. (*y*)); the latter probably from its being deemed unnecessary to swear in more than twelve, when the verdict of twelve would always suffice. It is to be observed, however, that in *grand* juries it is the practice to swear in a larger number (usually twenty-three); though less, (if amounting to twelve or more,) can make a valid presentment. The principle, whatever may be its origin, is attended at least with one practical advantage of the utmost importance; that in the event of a difference of opinion, it secures a discussion, and enables any one dissentient juror to compel the other eleven fully and calmly to reconsider the question. Some remarks will be found on this subject in the Third Report of the Common Law Commissioners appointed in 1828, p. 70; where it is recommended, that if, after a deliberation of twelve hours, nine out of the twelve concur, their verdict should be received. By a recent statute, 17 & 18 Vict. c. 59, it is provided as to verdicts in civil causes in *Scotland*, that if the jury are unable to agree, and if after six hours nine of them shall agree, the verdict of the nine shall be sufficient.

(*u*) Hughes *v.* Budd, 8 Dowl. P. C. 315; but see Morris *v.* Vivian, 10 Mee. & W. 137, where it was held to be a matter for the discretion of the court, whether they would grant a new trial under such circumstances.

[vitiate the verdict (*x*). And] by the antient rule, (which, in strictness, seems to be still in force), [if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned (*y*), the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart (*z*).] In practice, however, if the jury are unable to agree upon their verdict, one of them is often *withdrawn* by consent of the parties to the suit, so that no verdict can be given (*a*); or the whole jury may (with the like consent) be *discharged* from finding any verdict (*b*); or, again, they may (even without such consent) be discharged by the *judge*, after having retired for a considerable time, (as for a night,) for deliberation (*c*).

[When they are all unanimously agreed, the jury return back to the bar; and before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement, to which by the old law he was liable in case he failed in his suit, as a punishment for his false claim (*d*). To be *amerced*, or *a mercie*, is to be at the mercy of the Crown with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo*. The amercement is disused,] but an allusion to it may still be traced; for [if the plaintiff does not appear, no verdict can be given, and the plaintiff is said to be *nonsuit*; *non sequitur clamorem suum*. Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain the

(*x*) But the affidavit of a *juryman* as to the mode in which the jury came to a verdict cannot be received. Burgess *v.* Langley, 5 Man. & G. 722.

(*y*) Mirror, c. 4, s. 24.

(*z*) Lib. Ass. fol. 40, pl. 11.

(*a*) Stodhart *v.* Johnson, 3 T. R. 657; Harries *v.* Thomas, 2 Mee. & W. 38. If a juror be withdrawn by consent, and the action be afterwards proceeded with, or a fresh action brought, the defendant may apply to stay proceedings. Gibbs *v.* Ralph, 15 L. J. (Ex.) 7.

(*b*) Everett *v.* Youells, 3 B. & Ad. 349.

(*c*) Seally *v.* Powis, 3 Dowl. 372; R. *v.* Johnson, 5 Ad. & El. 513.

(*d*) Finch, L. 189, 252.

[issue, to be voluntarily nonsuited (*e*) or withdraw himself; whereupon the crier is ordered to *call the plaintiff;* and if neither he nor any body for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had and judgment consequent thereupon, he is for ever barred,] unless the judgment be reversed as erroneous, [from attacking the defendant upon the same ground of complaint. But in case the plaintiff appears, the jury, by their foreman, deliver in their verdict.]

By the verdict, (*verè dictum,*) [they openly declare (*f*) themselves to have found the issue, for the plaintiff, or for the defendant; and if for the plaintiff, they also assess the damages sustained by the plaintiff, in consequence of the injury upon which the action is brought (*g*).]

(*e*) A nonsuit is appropriate only to the case of the plaintiff's withdrawing himself. He cannot, therefore, be nonsuited against his will; for, instead of withdrawing, it is in his option to appear, (by himself or his attorney,) when the jury are ready to deliver their verdict. But if he has failed in the opinion of the jury (under the direction of the judge) to maintain his side of the issue, and he elects to appear, there will then, in lieu of the nonsuit, be a verdict against him; which, for the reason stated in the text, is generally less eligible. See Dewar *v.* Purday, 3 Ad. & El. 166.

(*f*) The verdict is said in our books to be either *privy* or *public*—and it is stated by Blackstone, (vol. iii. p. 377,) that "a privy verdict is "when the judge hath left or adjourned the court, and the jury "being agreed, in order to be delivered from their confinement, "obtain leave to give their verdict "privily to the judge out of court;" though he adds, that "if the judge "hath adjourned the court to his "own lodgings, and there receives "the verdict, it is a *public* and "not a privy verdict." He also states, that a privy verdict is of no force, unless afterwards affirmed openly in court, and that the jury may then vary from it, if they please; and that it is "a dangerous "practice, allowing time for the parties to tamper with the jury, and "therefore very seldom indulged in." At the present day it is wholly disused.

(*g*) By 3 & 4 Will. 4, c. 42, s. 28, the jury may upon the trial of any

Sometimes, if there arises upon the facts proved in the case, any difficult matter of law, the course is adopted of finding a *special* verdict,—a course [grounded on the Statute of Westminster, 13 Edw. I. c. 30, s. 2,] and the adoption of which is entirely at the choice of the jury (*h*). A verdict of this description, is drawn up in the form of making the jury [state the naked facts, as they find them to be proved (*i*); concluding conditionally,] that if upon the whole matter the court shall be of opinion that the issue ought to be found for the plaintiff, they then find for the plaintiff, and assess the damages accordingly; if otherwise, then for the defendant. [This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried (*j*).] But either party, if dissatisfied with the decision, is at liberty to appeal to the proper court of error in the Exchequer chamber (*k*).

[Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject, nevertheless,] as the law of the case is doubtful, [to the opinion of the court above, on a *special case*, stated by the counsel on both sides,] and containing a statement of facts mutually agreed upon. The proceedings on this are, in general, similar to those on a special verdict (*l*); the chief difference between them being that a

issue or inquisition of damages, allow *interest* at the current rate upon debts from the time when they were payable, if payable by virtue of a written instrument, and at a time certain; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed. (See Mowatt *v.* Lord Londesborough, 4 Ell. & Bl. 1.) And, by sect. 29, may give damages in the nature of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods, and also, in actions on policies of assurance, over and above the money insured.

(*h*) Mayor of Devizes *v.* Clark, 3 A. & E. 506.

(*i*) See Fryer *v.* Roe, 13 C. B. 427.

(*j*) See Reg. Gen. Mich. T. 1853, (Pr.) r. 16.

(*k*) As to this court, vide sup. p. 411.

(*l*) Until a very recent period this was otherwise; for there could be no proceeding in *error*, upon the

special case is not entered upon the *record*; and in either case the proceedings can only be by consent of the jury, (though in practice they never object to what the parties propose on the subject,)—the rule of law being, that the jury are always at liberty, without either special verdict or special case, to find their verdict absolutely, if they think fit, either for plaintiff or defendant (*m*).

[When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury;—a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious, and cheap, as it is convenient, equitable, and certain:] and indeed the trial by jury [ever has been looked upon as the glory of the English law.] In estimating its advantages it is to be considered, that [if the administration of justice is entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or, such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will frequently have an involuntary bias towards those of their own rank and dignity,—for it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random, in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to

judgment on a special case; but by 17 & 18 Vict. c. 125, s. 32, error may now be brought on such a judgment in the same manner as upon judgment on a special verdict, unless the parties agree to the contrary. See also Reg. Gen. Mich. T. 1854, and sched. No. 18.

(*m*) 3 Bl. Com. 378, cites Litt. s. 368; Mayor of Devizes *v.* Clark, 3 A. & E. 506.

[such facts as come properly ascertained before them. For here partiality can have little scope; the law is well known, and is the same for all ranks and degrees: it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice (*n*).]

The peculiar importance too of this mode of trial deserves remark, as applied to criminal cases, and most of all to those in which the Crown is directly concerned. It may be truly affirmed, that [the most transcendent privilege which any subject can enjoy or wish for is, that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals;] and there can be no doubt that this institution [has secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer (*o*), who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.]

(*n*) The recent institution of the new County Courts, (vide sup. p. 384,) in which the decision of matters of fact as well as law is generally intrusted to the judge, must not be considered as any indication that the views of Blackstone on the subject to which the above extract refers, are disregarded at the present day. For though in favour of the great objects of cheapness and dispatch, the parties are enabled in these courts to dispense with trial by jury, yet either of them is entitled to insist on that mode of decision, where the claim exceeds 5*l.*; and where it exceeds 50*l.*, it is only by consent of both parties that the County Court can exercise any jurisdiction whatever.

(*o*) Montesq. Sp. L. xi. 6.

IV. The issues of law or fact having been decided in the several methods above described, and it thus being ascertained whether the plaintiff is entitled to maintain his action for the civil injury which is the subject of complaint, or the defendant, on the other hand, to be discharged from the action, the next step is the *judgment*, that is, the formal award of redress in the one case, or discharge in the other. And as regards the issue in law, we have already been led in part to advert to this proceeding (*p*), the judgment in that case being in effect given at the time that the court deliver their opinion or decision upon the legal question, though it is not formally drawn up and entered on record till afterwards. But if the issue be an issue in fact, and tried by jury, the course of practice is as follows.

In the first place, whatever has been done subsequently to the joining of issue, and the awarding of the trial, is entered on the back of the nisi prius record, and is called the *postea*; the substance of which is, that [*postea* (*afterwards*) the said plaintiff and defendant appeared] in person or [by their attorneys, at the place of trial, and a jury being sworn, found such a verdict; or that the plaintiff, after a jury sworn, made default, and did not prosecute his suit, or as the case may happen (*q*).]

The unsuccessful party may then, within such interval of time as the practice allows for the purpose (*r*), move the court in *banc* (*s*) for a *new trial*, or for *arrest of judgment*, or for *judgment non obstante veredicto*, or for *a repleader* (*t*).

(*p*) Vide sup. p. 581.

(*q*) As to the form of the postea, vide Reg. Gen. Hil. T. 1853, (Pr.) in sched. Nos. 3, 4.

(*r*) By Reg. Gen. Hil. T. 1853, (Pr.) r. 50, no such motion, where the cause is tried in term, shall be allowed after four days from the trial, nor in any case after the expiration of the term; nor, when the cause is tried out of term, after the first four days of the ensuing term; unless, (in any of these cases,) entered in a list of postponed motions by leave of the court; and see as to these motions, r. 51—54.

(*s*) As to the term "*in banc*," vide sup. p. 415.

(*t*) The defendant may also move *to enter a nonsuit*, or the plaintiff to *set aside a nonsuit, and enter a verdict* for plaintiff. But such motions can only be made as *upon a point reserved*, that is, by leave of the judge who

And, 1. As to the motion for a *new trial.* The ground of this may be an irregularity in the proceedings connected with the trial, such as want of notice of trial; or any other matter *dehors*, (that is, extrinsic to,) the record, tending to show, that, though the trial may have been in due form, yet it has not done justice between the parties; such as [any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; or that it appears by the judge's report certified to the court, that the jury have brought in a verdict without, or contrary to, evidence (*u*), so that he is reasonably dissatisfied therewith: or that they have given exorbitant] or insufficient [damages; or that the judge himself has misdirected the jury, so that they found an unjustifiable verdict.] For any of these reasons, or for any of a similar kind, it is competent to the unsuccessful party, whether plaintiff or defendant, to move that the verdict that has been given be set aside, and a new trial had: the effect of which motion, if granted, is, that a trial of the same issue, (by a new jury duly summoned and impanelled as in other cases,) is instituted *de novo.*

[The exertion of these superintendent powers of the courts in setting aside the verdict of a jury, and granting a new trial on account of misbehaviour of the jurors, is of a date extremely antient. There are instances in the Year Books of the reigns of Edward the third (*v*), Henry the fourth (*w*), and Henry the seventh (*x*), of judgments being stayed even after a trial at bar, and new trial awarded,

tried the cause, granted during the course of the trial. By 17 & 18 Vict. c. 125, s. 33, it is provided, that in every rule *nisi* for a new trial, or to enter a verdict, or nonsuit, the grounds upon which such rule has been granted, shall be shortly stated. See Grayson *v.* Andrews, 10 Exch. 427.

(*u*) Where a new trial is ordered on the ground that the verdict was *against evidence*, the costs of the first trial shall *abide the event*, unless the court shall otherwise order; 17 & 18 Vict. c. 125, s. 44.

(*v*) 24 Edw. 3, 24; Bro. Ab. tit. Verdite, 17.

(*w*) 11 Hen. 4, 18; Bro. Ab. tit. Enquest, 75.

(*x*) 14 Hen. 7, 1; Bro. Ab. tit. Verdite, 18.

[because the jury had eaten and drunk without consent of the judge, and because the plaintiff had privately given a paper to a juryman, before he was sworn. And upon these the chief justice Glynn, in 1655, grounded the first precedent that is reported in our books (*y*) for granting a new trial upon account of *excessive damages* given by the jury, apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour.] About that time, however, [it was clearly held for law (*z*) that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court, lest posterity should wonder why a new trial was awarded without any sufficient reason appearing upon the record. But very early in the reign of Charles the second new trials were granted upon *affidavits* (*a*); and the former strictness of the courts of law in respect of new trials having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this, that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to another (*b*).] Nor can there be any doubt that this is a reasonable and salutary course of practice. [If every verdict was final in the first instance, it would tend to destroy this valuable method of trial.] For [either party may be surprised by a piece of evidence which, had he known of its production, he could have explained or answered; or may be puzzled by a legal doubt which a little recollection would have solved.] Besides, [in the hurry of a trial, the ablest judge may mistake the law, and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced

(*y*) Style, 466.

(*z*) Graves *v.* Short, Cro. Eliz. 616; Palm. 325; 1 Brownl. 207.

(*a*) R. *v.* Lord Fitz-Water, 1 Sid. 235; Goodman *v.* Cotherington, 2 Lev. 140.

(*b*) Bright *v.* Eynon, 1 Burr. 395.

[advocates. The jury are to give their opinion *instanter*, that is, before they separate, eat or drink; and under these circumstances the most intelligent and best intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse. Granting a new trial under proper regulations, cures all these inconveniences, and at the same time preserves entire, and renders perfect, that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial, on the other; and the subsequent verdict, though contrary to the first, imports no blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject, and nothing is now tried but the real merits of the case. A sufficient ground, however, must be laid before the court to satisfy them that it is necessary to justice that the cause should be further considered. If the matter be such as did not, or could not, appear to the judge who presided at nisi prius, it is disclosed to the court by affidavit; if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides, to impeach or establish the verdict; and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial, are, upon full deliberation, clearly explained and settled. Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have

[not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always very strongly to preponderate (c).]

2. [*Arrests of judgment* arise from *intrinsic* causes appearing on the face of the record,] showing that notwithstanding any verdict given for the plaintiff, he is not entitled to judgment; and it is only on the part of the defendant, therefore, that a motion in arrest of judgment is made. As if in an action for slanderous words, the defendant denies the words, and issue is joined thereon, now if a verdict be found for the plaintiff, that the words were actually spoken as affirmed by him, here—though that fact is established, yet the defendant may move in arrest of judgment that the words are not in their nature actionable;* and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. And it may

(c) In antient times the principal remedy for reversal of a verdict unduly given was by writ of *attaint*, which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve; the effect of which was, that if the jury of twelve were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods; which two latter punishments were in course of time commuted into a pecuniary penalty. (3 Bl. Com. 388, 402.) For it was deemed at the early period when this proceeding was first established, when the constitution of juries was different from what it now is, and they were summoned *to testify on their own knowledge* as to the truth of the facts in dispute, (see Plac. Ab. 3, Norfolc. &c.; 2 Reeves's Hist. 270, &c.) that a false verdict must necessarily be a perjured one. The writ of attaint was a form of proceeding at least as old as the reign of Henry the second and remained in force, (though quite fallen out of use,) till abolished by the stat. 6 Geo. 4, c. 50, s. 60. A full account of it is given in Blackstone's Commentaries, vol. 3, pp. 388—402.

be laid down generally, that whatever objection in point of substance, the defendant might have taken at an earlier stage, by way of demurrer, he is also entitled to take at this stage, in arrest of judgment; but no more in this shape, than in the other, can he be allowed to bring forward any objection in point of mere form. The case was formerly very different; for by the antient law, even the most trifling objection, in point of form, might be alleged in arrest of judgment; though in somewhat later times, by the statutes of *amendment* and *jeofail*, (so called because when a pleader, in the days of oral pleading, perceived any slip in the form of his allegation, he acknowledged such error by the expression of *j'ay faillé*, and obtained liberty to amend,) objections of mere form not brought forward by way of *special demurrer*, (which was the proper method for taking formal objections,) were, at a subsequent stage of the cause, cured or *aided* (*d*). But it is now provided, that no judgment shall be arrested, stayed, or reversed, for any imperfection, omission, defect in or lack of form (*e*); and, moreover, that where a motion shall be made in arrest of judgment by reason of the omission to allege some material fact, or other cause, the plaintiff shall be at liberty, by leave of the court (*f*), to enter a suggestion of the existence of the matter omitted, or any matter which, if true, would remedy the alleged defect; to which the defendant shall be at liberty to plead, and the parties may thereon proceed to issue and trial, as in ordinary cases (*g*).

3. A motion for *judgment non obstante veredicto* is also made in respect of some intrinsic objection apparent on the face of the record; but differs in this particular, from the

(*d*) See Wilkinson *v.* Sharland, 10 Exch. 724.

(*e*) 15 & 16 Vict. c. 76, s. 50. By s. [illegible] also, no pleading shall be deemed insufficient for any defect which could heretofore have been objected to only by special demurrer. Vide sup. p. 570, n. (*o*).

(*f*) See Manby *v.* Boycott, 2 Ell. & Bl. 46; Fisher *v.* Bridges, ibid. 128, n.

(*g*) 15 & 16 Vict. c. 74, ss. 143, 144.

motion in arrest of judgment, that it is usually made on the part of the plaintiff, and not of the defendant, and accordingly grounded on an objection to the case of the latter, and not of the former party (*h*). Thus, where the plea *confesses*, and attempts to *avoid*, the declaration, by some matter which amounts to no sufficient avoidance of it in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that issue has been found in favour of the defendant, yet the plaintiff may move that, without regard to the verdict, the judgment be given in *his* favour. For the plea having confessed the matter of fact in the declaration, and having opposed it by an allegation which, though true in fact, is bad in law, it appears upon the whole that the plaintiff is entitled to maintain his action (*i*). But the same rule applies to the motion for judgment *non obstante veredicto*, as to the motion in arrest of judgment, that it can be founded on no objection of a merely formal kind, but only on such as involves the substance and merits of the controversy. And the same practice obtains upon the motion now in question, as upon the other, of allowing the party whose pleading is in fault, to enter a suggestion of any matter which, if true, would remedy the alleged defect (*j*).

4. The motion for a *repleader* is, where [by the misconduct or inadvertence of the pleaders, the issue is joined on a fact totally immaterial or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given (*k*).] As if in an action

(*h*) See Reg. *v.* Darlington School (Governor of), 6 Q. B. 682, in which case Parke, B., said it might be made by defendant, if the plaintiff's replication confessed but failed to avoid the plea.

(*i*) As to judgment *non obstante*, &c., see Gilb. C. P. 126; Lambert *v.* Taylor, 4 Barn. & Cress. 138; Merry *v.* Chapman, 8 A. & E. 524, n.; Negelen *v.* Mitchell, 7 Mee. & W. 612; Atkinson *v.* Davies, 2 Dowl. N. S. 778; Shrewsbury *v.* Blount, 2 Man. & Gr. 508; Beaty *v.* Warren, 4 Man. & Gr. 158; Pim *v.* Grazebrook, 2 C. B. 429.

(*j*) 15 & 16 Vict. c. 76, ss. 143, 144.

(*k*) A repleader may be awarded by a court of *error*, Reg. Gen. Hil. T. 1853, (Pr.) 24.

against an executor, he pleads that he himself, instead of the testator, made no such promise as alleged in the declaration (*l*); or, if in an action of debt on bond conditioned to pay ten pounds ten shillings on a certain day, the defendant pleads payment of ten pounds (*m*),—in such cases the court will, after a verdict, award a repleader, (*quod partes replacitent*); the effect of which is, that [the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c. wherein there appears to have been the first defect or deviation from the regular course.] But repleaders are not now very usual; for they are awarded only where it is apparent to the court that the case of the party in default might probably be made good by a different manner of pleading (*n*). It is besides a rule, that a repleader is never granted in favour of the party who made the first fault, when the issue has been found against that party (*o*); nor in any case except where complete justice cannot otherwise be attained (*p*).

Where the verdict is a general one, and no special case or bill of exceptions occurred at the trial, (which is the ordinary state of circumstances,) then if the judgment on the verdict is not, by some of the means above pointed out, suspended or averted within the period allowed for the purpose, it follows that the party who obtained the verdict, is entitled to judgment, at any time after the expiration of that period (*q*).

(*l*) 2 Vent. 196.

(*m*) Kent *v.* Hall, Hob. 135. Et vide Spong *v.* Wright, 9 Mee. & W. 629; Atkinson *v.* Davies, ubi sup.

(*n*) R. *v.* Phillips, Burr. 301, 302; 3 Bl. Com. 395; Negelen *v.* Mitchell, 7 M. & W. 612.

(*o*) Bennett *v.* Holbeck, 2 Saund. 319 c; Gordon *v.* Ellis, 7 M. & G. 607.

(*p*) Goodburne *v.* Bowman, 9 Bing. 532. As to cases where a repleader will not be granted, see Negelen *v.* Mitchell, ubi sup.; Gwynne *v.* Burnell, 2 Cl. & Fin. 572; Willoughby *v.* Willoughby, 6 Q. B. 722; Gregory *v.* Duke of Brunswick, 3 C. B. 481; Crossfield *v.* Morrison, 7 C. B. 286; Doogood *v.* Rose, 9 C. B. 132; Rutland *v.* Bagshaw, 14 Q. B. 869.

(*q*) Execution frequently issues before there has been any opportunity of moving for a new trial or the like; for by 15 & 16 Vict. c. 76, s.

He accordingly then proceeds to *sign* judgment; that is, to obtain the signature of the proper officer of the court, to the proceedings, signifying generally that judgment is given in his favour; which, (in the case of a judgment upon verdict,) stands in the place of any actual delivery of it by the judges themselves. And upon the signing of the judgment, *costs* are also taxed in his favour by the same officer;—a subject on which we shall presently have occasion to speak more at large.

After signing judgment, the next step is to *enter the judgment on record*, by transcribing the whole proceedings on a parchment roll, and depositing this roll, and filing it of record, in the treasury of the court; and this, though properly the act of the court, is in practice performed, whenever it takes place, by the successful party, or rather by his attorney (*q*).

Hitherto we have pursued the history of a cause that comes to issue through the instrumentality of pleading. But its course may be of a very different and more summary kind. For, first, it is now provided (*r*), with a view to avoid, where practicable, the expense and delay attendant upon pleading, that where there is any question of fact disputed between the parties, they may at any time after writ

120, where a cause is tried out of term, the party obtaining a verdict shall be entitled to issue execution in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall otherwise order. And see Reg. Gen. Hil. T. 1853, (Pr.) r. 57, establishing the same rule where there has been a verdict in term, or a nonsuit in or out of term. But in such cases the opposite party will be entitled to move that the *judgment and execution may be set aside*, and a new trial, or such other relief as the case may require, granted.

(*q*) No entry of the judgment, on record, is, in the majority of cases, in fact ever made: but on signing the judgment, the form is pursued of making an *incipitur* on the paper on which it is signed (called the *judgment paper*), that is, an entry of the initial words in which the judgment *would* be recorded. And by 15 & 16 Vict. c. 76, s. 206, this will warrant taxing costs and issuing execution. See also Reg. Gen. Hil. T. 1853, (Pr.) rr. 56, 70.

(*r*) 15 & 16 Vict. c. 76, s. 42—48. (See Bishop *v.* Elliott, 11 Exc[illegible] 13.) And see the prior provisions of 3 & 4 Will. 4, c. 42, s. 25.

of summons, and before judgment, state such question by consent, and by order of a judge, in the form of an issue, but without pleadings; and such issue may be entered for trial, and tried accordingly, in the same manner as an issue joined in the ordinary way; and that where at the like stage of the cause, they are agreed upon facts, they may, by the like consent and order, state any question of law in a special case for the opinion of the court, without any pleadings; and may in either case agree, that, upon the finding of the jury on such issue, or upon the opinion of the court being given on such question, judgment may be entered for any specified sum of money to be paid by one of the parties to the other. Again, it may happen that, after the declaration has been delivered, one of the parties becomes entitled to judgment before any issue is attained. For in an action judgment will be awarded, not only [where the facts are confessed by the parties, and the law determined by the court, as in the case of judgment upon *demurrer*;] or [where the law is admitted by the parties, and the facts disputed, as in the case of judgment on a *verdict*;] but also [where both the fact and the law arising thereon are admitted by the defendant, which is the case on judgment by *confession*,] otherwise called judgment on *cognovit actionem*; and is also the case on judgment for *default of appearance* to the writ of summons (*s*); and of judgment for *default of plea* to the declaration; which last is otherwise called judgment by *nihil dicit*. And, lastly, judgment will be awarded [where the plaintiff is convinced that either the fact or law is insufficient to support his action, and therefore abandons his prosecution, which is the case of a judgment upon a *nonsuit*,] and also of a judgment upon *nolle prosequi* (*t*). In all these cases, however, the

(*s*) This sort of judgment is recently introduced into personal actions by the Common Law Procedure Act, 1852. Vide sup. p. 564. As to *costs* in actions on contracts, in which 20*l*., or less, is sued for, in case of judgment for default of appearance, see Reg. Gen. E. T. 1857.

(*t*) As to judgment by *nolle prosequi*, see 3 & 4 Will. 4, c. 42, s. 32; Bowden *v.* Horne, 7 Bing. 716; Fagan *v.* Dawson, 4 Man. & G. 711; Boyle *v.* Webster, 21 L. J. (N. S.) Q. B. 202. The books of practice

practical course is so far the same, that the successful party proceeds, upon the matter being terminated in his favour, to sign judgment, tax costs, and enter his judgment on record, in manner above described.

[The judgment, though pronounced or awarded by the judges,] or supposed to be so, where no actual delivery of it takes place, is, properly speaking, [not *their* determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him who hath rode over my corn, I may recover damages by law; but A. hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law; if the minor, it is then an issue in fact; but if both be confessed, (or determined to be right,) the conclusion or judgment of the court cannot but follow; which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be is indeed the result of deliberation and study to point out; and therefore the style of the judgment is, not that it is decreed or resolved by the court,—for then the judgment might appear to be their own; but "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or

speak also of judgments on *non sum informatus*; (where the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff;) and of judgments on *retraxit*; where the plaintiff says he *withdraws* his claim. But these forms do not now occur.

[default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff, upon] demurrer to [pleas in abatement of the suit or action; in which it is considered by the court that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea. It is easy to observe that the judgment here given is not final, but merely interlocutory; for there are afterwards further proceedings to be had when the defendant hath put in a better answer.

But the interlocutory judgments most usually spoken of, are those incomplete judgments whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for where judgment is given for the defendant, it is always complete as well as final.] And it happens where the defendant suffers judgment to go against him by *confession* or *for default of plea,* in any action brought for recovery of damages. In such a case as this, a jury is in general summoned to assess the damages, and [the entry of the judgment is, that the plaintiff ought to recover his damages (indefinitely);] but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded that, by the oaths of twelve honest and lawful men, he inquire into the said damages, and that the said inquisition be returned into court. This process is called a *writ of inquiry* (*u*); in the execution of which the sheriff (*v*), by his

(*u*) Vide sup. vol. II. p. 635. By 1 Will. 4, c. 7, a writ of inquiry may be returnable whether in term time or vacation; and by 3 & 4 Will. 4, c. 42, s. 18, judgment may be signed and execution issue forthwith, unless the sheriff certify that judgment ought not to be signed until defendant shall have had an opportunity to apply to the court to set aside the execution of the writ, or unless a judge shall think fit to stay the judgment. And see Reg. Gen. Hil. T. 1853, (Pr.) r. 55. As to notice of inquiry, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 34—37, 40.

(*v*) There is one case in which a writ of inquiry may be executed not

under-sheriff, [sits as judge, and tries by a jury, subject to nearly the same law and conditions as apply to the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll, in manner of a *postea*,—and thereupon it is considered that the plaintiff *do* recover the exact sum of the damages so assessed.] In like manner, when a demurrer is determined for the plaintiff, in an action wherein damages are recovered, the judgment is entered in the same interlocutory form, and is followed by a like writ of inquiry. But in many cases, though the action is brought in point of form for damages, (or *sounds* in damages, according to the technical term,) yet the amount recoverable by the plaintiff is substantially a matter of mere calculation, and one therefore upon which a jury would have no discretion to exercise; and in all such cases the course is not to issue any writ of inquiry, but to apply for an order of the court or a judge, that the amount which the plaintiff is entitled to recover, be ascertained by one of the principal officers (or masters) of the court (*x*).

[*Final* judgments are such as at once put an end to the action,] by the immediate award of the sum of money or specific thing due to the plaintiff, or of the discharge of the defendant from the action, as the case may be. This kind of judgment takes place in whatever manner the suit is determined, whether it be on demurrer, verdict, confession, default of appearance, default of plea, nonsuit, or *nolle prosequi*. But this distinction is always to be understood, with respect to cases where there has been no verdict, that if the action be for recovery of damages, the final judgment is always preceded by an interlocutory judgment

before the sheriff, but the judge at *nisi prius*; viz., in an action on a bond conditioned for performance of any act other than the payment of money. Vide stat. 8 & 9 Will. 3, c. 11; sup. vol. II. p. 106.

(*x*) 15 & 16 Vict. c. 76, s. 94. See Reg. Gen. Hil. T. 1853, (Pr.) rr. 171—173.

and writ of inquiry, or reference to the master thereon, to ascertain the amount of those damages; but if the action be for recovery of a debt or liquidated sum of money, then the judgment is final in the first instance (*y*). And we may remark here, that final judgments in the first instance, as upon *confession* or *default of plea*, are often agreed upon before an action is brought, and constitute a very usual form of security, the course being [for the debtor to execute a *warrant of attorney* to some attorney named by the creditor,] empowering him to suffer a judgment to pass against the debtor in one of these forms, [in an action of debt to be brought by the creditor against the debtor for the specific sum due, though this practice is subject to several restrictive regulations for the prevention of fraud or oppression (*z*).]

As to the form in which final judgment is entered. If the judgment be for the plaintiff, the form is that he do recover, *quod recuperet*, the debt or damages; or if for the defendant on a plea in abatement, that the declaration be quashed; or on a plea in bar, that the plaintiff take nothing by his writ, *nil capiat per breve;* and that the defendant may go thereof without a day, *eat inde sine die,* i. e. without any further continuance or adjournment (*a*).

(*y*) See 15 & 16 Vict. c. 76, s. 93.

(*z*) As to cognovits and warrants of attorney, see Reg. Gen. Hil. T. 1853, (Pr.) rr. 25, 26, 27; Lush's Pr. pp. 610—628, 2nd ed. Also by 1 & 2 Vict. c. 110, ss. 9, 10, no warrant of attorney or cognovit shall be of any force unless there be present some attorney of one of the superior courts on behalf of the person giving it, expressly named by him, and attending at his request, to inform him of the nature and effect of the instrument before the same is executed; which attorney shall subscribe his name as a witness to the due execution, and thereby declare himself to be attorney for the party, and state that he subscribes as such attorney. As to the effect allowed to judgments on warrants of attorney in cases of bankruptcy and insolvency, see 1 & 2 Vict. c. 110, s. 61; 6 & 7 Vict. c. 66, and 12 & 13 Vict. c. 106, ss. 133, 135, 136. As to the effect in cases of bankruptcy of a *judge's order* given by a defendant by consent, for the same purpose as a *cognovit*, see sect. 137 of the Act last mentioned.

(*a*) Formerly, in the case of a judgment for the plaintiff, these words were added, "and that the "defendant be amerced for his wil-

At common law, all judgments had relation to the first day of the Term in which they were signed, though in point of fact not signed till afterwards (b), the Term being considered, for this and some other purposes, as consisting but of one day. But by the present rules of practice, all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day; provided however, that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc* (c).

It is a property of judgments in the superior courts that they bind all *lands, tenements, and hereditaments*, of which the defendant himself, or any person in trust for him, shall be seised or possessed, or over which he shall have any disposing power, exercisable without the assent of any other person, for his own benefit, at the time when the judgment is entered up, or at any time afterwards;—so as to take effect in priority to all claims arising after the judgment (d); subject however to the provision, that as re-

"ful delay of justice;" and in the case of judgment for the defendant, or a plea in bar, that the plaintiff "be also amerced for his false claim," *pro falso clamore suo*. The amercement in either case has long been merely nominal, and is not now inserted in the judgment. It was also formerly adjudged in certain cases, that the defendant be taken up, *capiatur*, till he pay a fine to the Crown for his falsehood or the like. This is now abolished, in some actions, by 5 W. & M. c. 12, and, in all, disused.

(b) Jeffreson v. Morton, 2 Saund. by Wms. 8 k.

(c) Reg. Gen. 1853, (Pr.) r. 56. As to judgment *nunc pro tunc*, see Miles v. Williams, 9 Q. B. 47; Fishmongers' Company v. Robertson, 3 C. B. 970; Freeman v. Tranah, 12 C. B. 406; Heathcote v. Wing, 11 Exch. 355. The rule of court above mentioned is a re-enactment of one to the same effect made in the reign of Will. 4; and even as early as the time of Charles the second it had been provided in favour of purchasers *bonâ fide* for valuable consideration, that, as *against such purchasers*, judgments shall, in consideration of law, bind the lands of the debtor only from such time as they shall be signed, and shall not relate to the first day of the Term, 29 Car. 2, c. 3, ss. 13—15.

(d) This property results from the nature of that writ of execution called an *elegit*, as to which, vide post, p. 660; for by force of 1 & 2 Vict. c. 110, s. 11, that writ directs all such lands, &c. as above described, to be

gards all purchasers, mortgagees and creditors, the judgment shall have no such effect, until it be duly registered in the Common Pleas, which registration must also be renewed every five years (*e*). But as to *goods and chattels*, the case, it is to be observed, is different; for these are bound as between the *parties*, not from the judgment, but from the date or *teste* of the writ of execution thereon; and as against *purchasers*, (generally speaking,) are bound only from the time of actual seizure under the execution (*f*). Judgments (*g*) also operate as a *charge in equity*, upon all lands, tenements, and hereditaments, of or to which the defendant at the time of entering up the judgment, or at any time afterwards, is seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, or over which he has any such disposing power as aforesaid; and are binding as against him and all persons claiming under him, after the judgment, and as against the issue of his body, and all whose interest he could without the assent of any other person have barred: but this is subject to the same provision as before mentioned, requiring registration, to make the charge effectual as against purchasers, mortgagees and creditors (*h*).

Moreover, by 1 & 2 Vict. c. 110, s. 17, it is provided, that every judgment debt shall carry interest, at the rate of

delivered to the creditor. A judgment against a mortgagee, would formerly bind the land mortgaged, even though the mortgagee was paid off, and the land actually conveyed to a purchaser or another mortgagee; but it is now provided by 18 & 19 Vict. c. 15, s. 11, that this shall no longer be the case as to future transactions.

(*e*) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15. The system of registration under these Acts, is in lieu of the previous method of *docketing* judgments, &c.; as to which, see 2 Impey's Pr. 427.

(*f*) The law on this subject is more particularly stated, sup. vol. II. p. 52.

(*g*) By sect. 18 of 1 & 2 Vict. c. 110, the same effect belongs to rules of court, (when made for the payment of money,) as belongs to judgments under that Act.

(*h*) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15. See Watts v. Porter, 3 Ell. & Bl. 743.

4*l.* per cent. per annum, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*i*).

[Thus much for judgments—to which *costs* are a necessary appendage—it being now as well the maxim of ours, as of the civil law, that "*victus victori in expensis condemnandus est*" (*k*), though the common law did not allow any.] They are accordingly taxed (as already remarked) at the same time that the judgment is signed, and always form part of its aggregate amount (*l*). But the law of costs deserves a more particular attention than could conveniently have been bestowed upon it when the subject was before touched upon, and we therefore resume the consideration of them in this place.

[The first statute which gave costs *eo nomine*] to the plaintiff, [was the statute of Gloucester, 6 Edw. I. c. 1, (as did the Statute of Marlbridge, 52 Hen. III. c. 6, to the defendant, in one particular case relative to wardship in chivalry,) though in reality costs were always considered and included in the *quantum* of damages, in such actions where damages are given (*m*);—and even now costs for the plaintiff are always entered on the roll, as increase of da-

(*i*) Newton *v.* Grand Junction Railway Company, 16 Mee. & W. 139.

(*k*) Cod. 3, 1, 13.

(*l*) As to taxing costs, see 7 Will. 4 & 1 Vict. c. 30, s. 23; 6 & 7 Vict. c. 73, ss. 37—43; Reg. Gen. Hil. T. 1853, (Pr.) rr. 59—62, and Directions to the Masters of the Court issued in the same Term. There are many cases of vexatious proceeding, in which the legislature had formerly provided, that the party in fault should be punished by the payment to his adversary of *double*, or (sometimes) *treble* costs; but by 5 & 6 Vict. c. 97, all such provisions are now repealed; and it is enacted, that the adversary shall be entitled only to a full and reasonable indemnity, to be taxed by the proper officer; which taxation shall, as in ordinary cases, be subject to review.

(*m*) As to the history of costs, see Burgess *v.* Langley, 5 Man. & G. 723, *in notis*; Partridge *v.* Gardner, 4 Exch. 303; Howell *v.* Rodbard, ibid. 309; Callander *v.* Howard, 1 L. M. & P. 755; Bentley *v.* Dawes, 10 Exch. 347; Cannon, *dem.*, Rimington, *ten.*, 12 C. B. 514.

[mages by the court. But because those damages were frequently inadequate to the plaintiff's expenses, the Statute of Gloucester orders costs to be also added, and further directs, that the same rule shall hold place in all cases where the party is to recover damages.] But with the exception that has been mentioned, [no costs were allowed the *defendant*, in any shape, till the statutes 23 Hen. VIII. c. 15; 8 Eliz. c. 2; 4 Jac. I. c. 3; 8 & 9 Will. III. c. 11; and 4 Ann. c. 16; which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had recovered.] And even after these enactments, there still remained several cases in which the law was defective in this particular, both as regards the plaintiff and the defendant: but these defects have now been remedied by the statutes 9 Ann. c. 20; 1 Will. IV. c. 21; 3 & 4 Will. IV. c. 42, ss. 31—34; 4 & 5 Will. IV. c. 39; and 15 & 16 Vict. c. 76, ss. 81, 145, 223. More particularly it is provided by these statutes, that though the party who succeeds in the cause generally, shall have general costs in the cause; yet his adversary succeeding on any particular issue, whether in law or fact, shall be entitled to the costs of such issue (*n*).

With respect to paupers, [that is, such as will swear themselves not worth 5*l.*] in the world, except their wearing apparel and the matter in question in the cause, it is to be observed, that they are by statute 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15, exempt, when plaintiffs, (but not when defendants,) from the payment of court fees, and entitled to have counsel and attorney assigned to them by the court, without fee, and are excused from paying costs when unsuccessful, [but shall suffer other punishment, at

(*n*) See especially 15 & 16 Vict. c. 76, s. 81; Reg. Gen. Hil. T. 1853, (Pr.) r. 62. By 3 & 4 Will. 4, c. 42, s. 31, which for the first time provides, that *executors* and *administrators*, when *plaintiffs*, shall be liable to costs, power is given to the court or a judge to exempt them from such liability by special order, in any particular case. (Redmayne *v.* Moon, 25 L. J. Q. B. 311.) As to costs in proceedings by and against the Crown, vide post, c. xv.

[the discretion of the judges (o).] A person however thus suing *in formâ pauperis* [may recover costs, though he pays none, for the counsel and clerks are bound to give their labour to *him*, but not to his antagonists.] To prevent, besides, the abuse of suing in the superior courts in matters of small amount, it is provided (as already shown), that, (subject to certain exceptions,) any plaintiff who resorts to one of these, in a case which would have been cognizable in a County Court, and recovers no more than 20*l.* (in some forms of action), or no more than 5*l.* (in others), will have no costs, unless he satisfies the court or a judge that he had sufficient reason for taking that course (*p*). Moreover, if the plaintiff, instead of taking out execution upon a judgment, bring an action thereon, he shall, by 43 Geo. III. c. 46, s. 4, recover no costs of suit, except the court or a judge shall otherwise order; nor are any costs allowed in a penal action, to a plaintiff suing as a common informer, unless they are expressly given by the statute on which he sues; for as the action itself creates the right, he has no claim to damages; and by the general rule of law, where there are no damages there can be no costs (*q*).

After judgment—unless the party condemned takes some course to be relieved from its effect, he will be im-

(*o*) Blackstone says, it was formerly usual to give such paupers, if non-suited, their election, *either to be whipped or pay their costs.* (3 Bl. Com. 400.) But in modern practice no instance of the award of *any* punishment, in such cases, has occurred. As to suing *in formâ pauperis*, see Pratt *v.* Delarue, 10 Mee. & W. 512; Doe *v.* Owens, ibid. 514; Hall *v.* Ive, 7 Man. & G. 1001; Reg. Gen. Hil. T. 1853, rr. 121, 122.

(*p*) Vide sup. p. 383. Other provisions, depriving the plaintiff of his costs, in certain cases where the amount recovered is less than 40*s.*, have been made by various statutes. See 43 Eliz. c. 6, s. 2; 21 Jac. 1, c. 16, s. 6, 3 & 4 Vict. c. 24; 4 & 5 Vict. c. 28; Sherwin *v.* Swindall, 12 Mee. & W. 783; Lyons *v.* Hyman, 5 Exch. 749, Bowyer *v.* Cook, 4 C. B. 236; Richards *v.* Bluck, 6 C. B. 443, Richardson *v.* Barnes, 7 D. & L. 96. But the importance of these provisions is now somewhat diminished by the introduction of the general enactment referred to in the text.

(*q*) College of Physicians *v.* Harrison, 9 B. & C. 524.

mediately liable to execution. Such relief he may obtain, where there is ground for it (r), by—

V. *Proceedings in error* (s). Error lies [for some supposed mistake in the proceedings in a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies (t).] It lies either upon matter of *fact* or matter of *law*. The errors in *fact* which may give rise to a proceeding of this kind are not numerous, but among them are the following:—that the defendant, being an infant, appeared by attorney, and not by guardian (u); or

(r) Besides the proceeding in error, Blackstone (vol. iii. pp. 402, 405) speaks of a writ of attaint, a writ of deceit, and a writ of *audita querela*. But the two first of these are now abolished, and the last may be said to be nearly obsolete. The writ of attaint we have before had occasion to notice, vide sup. p. 632, n. (c). The writ of deceit was an action brought in the Common Pleas to reverse a judgment obtained in any real action, by fraud or collusion between the parties, to the prejudice of a right of a third person. It was abolished by 3 & 4 Will. 4, c. 27, s. 36. The *audita querela* is a writ that lies for the defendant against whom judgment is given, and who is therefore in danger of execution, or perhaps actually in execution, but who is entitled to be relieved upon some matter of discharge which has happened since the judgment; as if the plaintiff has given him a general release, or if he has paid the debt to the plaintiff. It is a writ directed to the court in which the judgment is recovered, stating that the complaint of the defendant has been heard, *audita querela defendentis*, and then setting forth the matter of complaint, and enjoining the court to call the parties before them, and cause justice to be done. But the indulgence now shown by the courts in granting relief upon *motion*, has almost superseded the remedy by *audita querela*. (See 2 Saund. 147 e.) And now by Reg. Gen. Hil. T. 1853, (Pr.) r. 79, no writ of *audita querela* shall be allowed, unless by rule of court or order of a judge.

(s) These proceedings formerly began by a *writ* of error, used out of the common law side of the Court of Chancery, addressed to the chief justice of the court below in which the judgment was given, and commanding him to send a transcript of the record to the Court of Error. But now, by 15 & 16 Vict. c. 76, s. 148, this writ is, in almost every case, (see Arding *v.* Holmer, 26 L. J., Exch., 72,) dispensed with, and the proceedings begin with the memorandum hereafter described.

(t) As to false judgment, see Overton *v.* Swettenham, 3 Bing. N. C. 786; Crooks *v.* Longden, 5 Bing. N. C. 410.

(u) Bird *v.* Pegg, 5 B. & Ald. 418.

that the plaintiff or defendant was a married woman when the suit commenced (x). But the most usual species of the proceeding is that which is founded upon some supposed mistake of *law*, apparent on the face of the record (y), such as might have formed a sufficient ground, at the proper time, for a motion in arrest of judgment, or a motion for a judgment *non obstante veredicto* (z).

Formerly the suitors were much perplexed by proceedings in error instituted [upon very slight and trivial grounds, as mis-spellings, and other mistakes of the clerks,] which in general were held sufficient, unless amended, to vitiate the proceedings, even after judgment; and were at the same time incapable of amendment, after judgment was actually recorded, unless within the very Term in which the act so recorded was done; for during the Term the record was [held to be in the breast of the court, but afterwards it admitted of no alteration (a).] But this strictness has been relaxed by many modern statutes; and it is now provided, that no judgment shall be reversed for any imperfection, omission, or defect of form (b). And even in case of ma-

(x) King v. Jones, Ld. Raym. 1525.

(y) Error may now also, as we have seen, sup. p. 625, n. (l), be brought upon a special case; though that is *not* matter of record; and an analogous proceeding (introduced by 17 & 18 Vict. c. 125, ss. 34, 35, 36, and called, by that act, an *Appeal*) may be instituted before the Court of Error, in reference to any decision of the court below, upon a motion for a new trial, (in certain cases, where it is moved as on a ruling contrary to law,) or for leave to enter a verdict, or for leave to enter a nonsuit; though such motion and decision never appear upon record. As to error upon the award of a writ of *venire de novo*, see 17 & 18 Vict. c. 125, s. 48.

(z) Vide sup. p. 633.

(a) Blackstone attributes this strictness partly to a "narrowness of thinking," on the part of the judges, partly to a "real shallowness, but affected timidity," engendered by some severity shown in the reigns of Edward the first and Edward the third, with regard to the offence of surreptitiously erasing and altering records, particularly the inflicting of rigorous forfeitures and punishments on the several judges, for alleged malpractices in this particular. 3 Bl. Com. 408, 411.

(b) 15 & 16 Vict. c. 76, s. 50. Such defects were, even before this act, for the most part cured after judgment, by the statutes of *jeofail and amendment* before mentioned; vide sup. p. 632.

terial mistake, that it shall be lawful for the Superior Courts, or any judge thereof, or any judge sitting at *nisi prius*, at all times to make all such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy; and to do this, either with or without costs, and upon such terms as to the court or judge may seem fit (c). It is also now enacted, that no judgment shall be reversed for any error, unless the proceeding for the purpose be commenced and prosecuted with effect, within six years after such judgment is signed or entered of record, or within six years after the removal of any disability under which the party aggrieved may have laboured at the time his title to bring error accrued (d). And further, that execution shall not be stayed by proceedings in error, brought by the defendant in the action, on any judgment without the special order of the court or a judge, unless the party enters into a recognizance, with sufficient sureties, in double the sum adjudged to be recovered, to prosecute the proceedings in error with effect, and also to pay all money and costs which may ultimately become due from him, either on the judgment itself, or the proceedings for its reversal (e). But until default is made in entering into such recognizance, proceedings in error are generally a stay of execution (*f*).

As to the course of proceeding in error. Supposing the error to be in *fact*, the party aggrieved, (or plaintiff in error,) begins by delivering to one of the masters of the court in

(c) 15 & 16 Vict. c. 76, s. 222; 17 & 18 Vict. c. 125, s. 96. (See Mitchell *v.* Crassweller, 13 C. B. 237; Wilkin *v.* Reed, 15 C. B. 192; May *v.* Footner, 5 Ell. & Bl. 505; Brennan *v.* Howard, 1 H. & N. 138.) Even before these Acts amendments had latterly been often allowed in case of material mistake, upon condition of paying costs, though the application to amend had not been made until after the judgment had been recorded, and the Term passed, or even after error brought. See Richardson *v.* Mellish, 3 Bing. 334; S. C. in error, 7 B. & C. 819; S. C. Dom. Proc. 1 Clark & Fin. 224; Paddon *v.* Bartlett, 3 A. & E. 887.

(d) 15 & 16 Vict. c. 76, s. 146.

(e) Ibid. s. 151.

(*f*) See 15 & 16 Vict. c. 76, ss. 150, 158; Semple *v.* Turner, 6 Mee. & W. 152.

which the judgment has been given, a *memorandum* in a prescribed form, alleging that there is error in fact in the proceedings; and it is accompanied by an affidavit of the matter of fact referred to (*g*). This is followed by an *assignment* of error (*h*); which is analogous to a declaration; and is met by a plea on the part of the defendant in error: and the parties may thus be conducted to an issue in law or in fact, upon which judgment of affirmance or reversal will follow. So that redress may be thus obtained in the same court by which the erroneous judgment was given (*i*): for the matter of fact assigned for error, not being apparent on the face of the proceedings, there has in reality been no error, so far as its judges are concerned, and the correction of the record is therefore left, without impropriety to *them*. In the more important and ordinary case of error in *law*, the course is so far similar, that it begins with delivering to the master of the court, a *memorandum*, (but in this case without affidavit,) alleging that there is error in law. If the defendant in error intends to rely on the proceeding being barred by lapse of time, or release of errors, or other like matter of fact, he is then to give the plaintiff in error notice to assign error; and the *assignment* may lead to an issue in law or in fact, as in the case before supposed (*j*). But otherwise, the plaintiff in error proceeds, after delivering the memorandum, to enter on the judgment roll, a mere *suggestion*, (in a prescribed form,) to the effect that error is alleged by the one party, and denied by the other; and the cause is then set down for argument in the Court of Exchequer Chamber (*k*), in which

(*g*) 15 & 16 Vict. c. 76, s. 158. See Arding *v.* Holmer, 26 L. J. (Exch.) 72; where it was held that to reverse an outlawry for error in fact, a *writ* of error must still be used, according to the practice antecedent to this statute.

(*h*) See Reg. Gen. Hil. T. 1853, (Pr.) rr. 64—66.

(*i*) Casteldine *v.* Mundy, 4 B. & Ad. 90. In this case, however, it was held that in error in fact on a judgment in the Common Pleas, error might be brought either in the Common Pleas, or in the Queen's Bench.

(*j*) 15 & 16 Vict. c. 76, s. 182.

(*k*) See Reg. Gen. Hil. T. 1853, (Pr.) rr. 67, 68.

resides the immediate jurisdiction of correcting the errors in law of any of the three superior courts (*l*); and the master of the court whose proceedings are alleged to be erroneous having brought the judgment roll into the Exchequer Chamber (*m*), that court reviews the proceedings, and gives such judgment thereon as it thinks fit; and this judgment is entered accordingly on the roll (*n*). If the original judgment be affirmed, the successful party is entitled to the costs incurred by the writ of error (*o*); but if the judgment be reversed, no such costs are allowed (*p*). If necessary, however, a writ of restitution will be awarded to the plaintiff in error, by the court in which the original judgment was given, to enable him to recover whatever has been taken from him under that judgment (*q*); or the court will grant that relief in a more summary way, and by its mere rule or order. The proceedings are for the present, therefore, thus brought to a termination (*r*). The unsuccessful party however may still, if he thinks proper, resort to an ulterior appeal, by way of error, to the House of Lords; the course of proceeding upon which is, in a general point of view, the same as in the Exchequer Chamber (*s*). But by the

(*l*) Vide sup. p. 411. As to the courts of common law of the *counties palatine*, it is provided by 15 & 16 Vict. c. 76, s. 233, that the Court of Queen's Bench shall be the Court of Error from them; that it shall be sufficient to transmit to the Queen's Bench a transcript of the record below; and that the judgment of the Queen's Bench thereon shall be certified by one of the masters, and entered on the original record below; but subject to the right of either party to bring error on that judgment, according to the same course of proceeding as in actions brought in the Queen's Bench itself (s. 233). Et vide 17 & 18 Vict. c. 125, s. 102.

(*m*) See Gregory *v.* Cotterell, 5 Ell. & Bl. 584.

(*n*) 15 & 16 Vict. c. 76, ss. 155—157. See Lane *v.* Hooper, 3 Ell. & Bl. 731.

(*o*) 3 Hen. 7, c. 10; 13 Car. 2, st. 2, c. 2, s. 10; 8 & 9 Will. 3, c. 11, s. 2; 17 & 18 Vict. c. 125, s. 43. As to taxing the costs, see Reg. Gen. Hil. T. 1853, (Pr.) r. 69, (Pl.) r. 25.

(*p*) See Fisher *v.* Bridges, 3 Ell. & Bl. 642.

(*q*) 15 & 16 Vict. c. 76, s. 155.

(*r*) Various provisions are contained in the 15 & 16 Vict. c. 76, to prevent proceedings in error from abating from death or marriage of parties (ss. 161—167).

(*s*) See 15 & 16 Vict. c. 76, s. 155.

practice of that House, each party, before the hearing, prepares and delivers for distribution among the Lords, a printed statement of his case, signed by counsel who attended the hearing below, or who are to attend the hearing in the House of Lords (*t*).

VI. If the regular judgment of the court, after the decision of the suit, be not suspended or reversed by one or other of the methods mentioned in this chapter, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. This is performed by different writs of execution (*u*), according to the nature of the action and of the judgment which is recovered. In the ordinary actions, to which our attention is at present immediately directed, the judgment is in general for recovery of *money* only, (either by way of debt or damages,) and not for the recovery of any specific chattel; there

(*t*) It may be noticed that where the judges are *equally divided* in opinion, judgment goes for *defendant in error*. This is the rule of the House of Lords (see The Queen *v.* Millis, 10 Cl. & Fin. 534); and it is the same in the other Courts of Error.

(*u*) As to all writs of execution, it is provided by 3 & 4 Will. 4, c. 67, s. 2, that they may be *tested* on the day on which they are issued, and be made *returnable* immediately after the execution thereof. Also by 15 & 16 Vict. c. 76, s. 120, and Reg. Gen. Hil. T. 1853, (Pr.) r. 57, that when a verdict is obtained in Term, or a plaintiff has been nonsuited in or out of Term, judgment may be signed, and execution issued in fourteen days, unless otherwise ordered. Also by the Act last mentioned, ss. 121—125, that a writ of execution may in all cases be issued at once into any county, whether a county palatine or not, and whether the venue was laid there or not; that the party entitled to execution may in every case levy the poundage fees and expenses over and above the sum recovered; and that writs of execution, while unexecuted, shall not remain in force for more than a year from the *teste*, but may from time to time be renewed. (See 17 & 18 Vict. c. 125, s. 94.) Also by Reg. Gen. Hil. T. 1853, (Pr.) r. 70, &c., that it shall not be necessary before issuing execution to enter the proceedings on any roll, but that none shall be issued until the judgment paper, *postea*, or inquisition, has been seen by the proper officer. And see in the same Rules, and in the schedule thereto attached, various other provisions as to writs of execution. It may be remarked, too, in reference to all these writs, that they are incapable of being executed on a *Sunday*. (Arch. Pr. by Chitty, 548, 8th ed.)

being, however, an exception to this in the case of *detinue*, in which the judgment is for recovery of the goods themselves which are detained, or the value thereof, with damages and costs. And in that action there is accordingly a special writ of execution, called [a *distringas*, to compel the defendant to deliver the goods by repeated distresses of his chattels (*v*), or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered; and if the defendant still continues obstinate, then, (if the judgment hath been by default, or on demurrer,) the sheriff shall summon an inquest, to ascertain the value of the goods and the plaintiff's damages; which (being either so assessed, or by the verdict, in case of an issue (*x*),) shall be levied on the person or goods of the defendant.] And so, now, it is provided by 17 & 18 Vict. c. 125, s. 78, that in any action for the detention of any chattel, where there has been a verdict assessing its value (*y*), the court or judge shall have power if they or he see fit, upon the application of the plaintiff, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel, upon paying the value assessed; and that if it cannot be found, and the court or judge do not otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the bailiwick, until the defendant shall render the chattel,—or, at the option of the plaintiff, cause to be made of the defendant's goods, the assessed value of the chattel, with damages, costs, and interest besides.

Where money only is recovered, the practice of the court allows the judgment creditor to resort to one of the four following writs of execution:

1. The writ of *capias ad satisfaciendum*. [The intent of this writ is to imprison the body of the debtor, till satisfaction be made for the debt or damages, and costs. It there-

(*v*) 1 Roll. Ab. 737; Rast. Ent. 215.

(*x*) Bro. Ab. tit. Damages, 29.

(*y*) See Chilton *v.* Carrington, 15 C. B. 730.

[fore doth not lie against any privileged persons, peers, or members of parliament. And Sir E. Coke also gives us a singular instance (z), where a defendant, in the fourteenth year of Edward the third, was discharged from a capias because he was of so advanced an age *quod pœnam imprisonamenti subire non potest.* If an action be brought against a husband and wife, for the debt of the wife when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and wife in execution (a);] and if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* may be either awarded against her alone, or against her and her husband jointly (b). [Yet if judgment be recovered against a husband and wife, for the contract of the wife during her coverture, the *capias* shall issue against the husband only.]

Under the writ of *capias ad satisfaciendum* the sheriff cannot legally break open the house where the party is found (c); but where the outer door is not closed he is warranted in breaking open an inner one.

[The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and, therefore, when a man is once taken in execution under this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I. c. 24, if the defendant dies (d) while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster immediately after the execu-

(z) Co. Litt. 289.

(a) See Bardolph v. Perry, Moor, 704; Larkin v. Marshall, 4 Exch. 804; Edwards v. Martyn, 17 Q. B. 693; Ivens v. Butler, 26 L. J. (Q. B.) 145; 15 & 16 Vict. c. 76, s. 141.

(b) Beynon v. Jones, 15 Mee. & W. 566; Thorpe v. Argles, 1 D. & L. 831. See 15 & 16 Vict. c. 76, s. 141.

(c) Arch. Pr. by Chitty, 549, 8th ed.; 5 Rep. 92.

(d) As to the disposal of the body of a defendant *dying* in custody under a *ca. sa.*, see Queen v. Fox, 2 Q. B. 246.

[tion thereof, to make the plaintiff satisfaction for his demand (*e*). And if he does not then make satisfaction, he must remain in custody till he does (*f*),] or till he is otherwise lawfully discharged as an insolvent (*g*).

In the particular case where a defendant, (being about to abscond from the realm,) has been, on that ground, held to bail, there (*h*), if judgment in the action be obtained against him, and a *capias ad satisfaciendum* be sued out, and *non est inventus* returned thereon (*i*), [the plaintiff may sue out a process against the bail, who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs, or that he would surrender himself a prisoner, or that they would pay it for him. As therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place (*j*). In order to which, a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages.] And on such writ, if they show no sufficient cause, and the defendant does not surrender himself (*k*) within the period prescribed by the practice of the courts (*l*) in this particular, the plaintiff may

(*e*) As to the duty and the responsibility of the sheriff in executing it, see Morrish *v.* Murray, 13 Mee. & W. 52; Howden *v.* Standish, 6 C. B. 520.

(*f*) A written order, however, under the hand of the attorney in the cause, by whom the capias was issued, will justify the sheriff or gaoler in discharging him, unless written notice to the contrary shall have been given to the sheriff or gaoler by the creditor; but such discharge shall be no satisfaction of the debt, unless made by the authority of the creditor. 15 & 16 Vict. c. 76, s. 126.

(*g*) As to the law of insolvency, see vol. II. p. 175. And see as to *insane* prisoners, 1 & 2 Vict. c. 110, ss. 102, 103. And as to prisoners and proceedings against them generally, Reg. Gen. Hil. T. 1853, rr. 123—129.

(*h*) Vide sup. p. 566.

(*i*) By 17 & 18 Vict. c. 125, s. 90, writs of execution to fix bail may be tested, returnable in vacation.

(*j*) Lutw. 1269—1273.

(*k*) Lush's Prac. 569—572, 2nd ed.

(*l*) See 1 Arch. by Chitty, 489, 504; Sanderson *v.* Brown, 7 A. & E. 261.

have judgment and execution against the bail (*m*). It is also in the election of the plaintiff to proceed by *action of debt* against the bail, on their recognizance.

A *capias ad satisfaciendum* might, until lately, issue for a judgment debt of any amount. But by 7 & 8 Vict. c. 96, s. 57 (*n*), it was enacted, that no person should be charged or taken in execution on a judgment obtained in any court, superior or inferior, in any action for the recovery of a debt not exceeding 20*l*. exclusive of the costs recovered by the judgment; subject, however, to this proviso, that where such debt should appear to the judge trying the cause, (being a judge of the superior courts, or a barrister or attorney,) to have been incurred under false pretences, or with a fraudulent intent, or without a reasonable assurance of being able to pay or discharge the same, it should be lawful for such judge to order the defendant to be taken and detained in execution upon such judgment, as if the Act had not passed (*o*). And it has been since provided by 8 & 9 Vict. c. 127, and 10 & 11 Vict. c. 102, s. 2, that judgment debtors to such extent as above mentioned may be summoned before the Insolvent Court in London, or the County Court for the district in the country, (as the case may require,) and thereupon be ordered to pay the debt by instalments or otherwise; and further, that in case of their non-compliance with such order, or of its appearing to the court that they have been guilty of fraud in contracting the debt, or of having contracted it without reasonable prospect of being able to pay the same, they may be committed to prison for forty days, and the

(*m*) As to the form and course of proceeding on the writ of *scire facias* in this and in several other cases, see 15 & 16 Vict. c. 76, s. 132; as to *ca. sa.* against bail, Reg. Gen. Hil. T. 1853, (Pr.) rr. 74, 75.

(*n*) Even before this statute it had been provided by 48 Geo. 3, c. 123, that a debtor in execution for a debt not exceeding 20*l*. might, after a year's imprisonment, on application to the court in which the judgment was recovered, obtain the immediate discharge of his person. See Reg. Gen. Hil. T. 1853, (Pr.) r. 129.

(*o*) As to this provision see Blew *v.* Steinau, 11 Exch. 440; Johnson *v.* Harris, 15 C. B. 357.

imprisonment under such committal shall not operate in satisfaction or discharge of the debt (*p*).

2. [The next species of execution is against the goods and chattels] of the party against whom the judgment is recovered, [and is called a writ of *fieri facias*, from the words in it, where the sheriff is commanded *quod fieri facias de bonis*, that he cause to be made of the goods and chattels of the party, the sum or debt recovered. This lies as well against privileged persons, peers, &c., as other common persons; and against executors or administrators, with regard to the goods of the deceased (*q*). The sheriff may not break open any outer doors (*r*), to execute this writ: but must enter peaceably; and may then break open any inner door in order to take the goods (*s*). And he may sell the goods and chattels (*t*)] of the party against whom the writ is issued, including even his estate for years, (which is a chattel real (*u*),) or his growing crops, (which are in the nature of personalty (*v*),) [till he has raised enough to satisfy the judgment.] This, however, is subject to such restrictions as the law has deemed it reasonable to impose for the protection of landlords. For, first, by 8 Anne, c. 14, the sheriff cannot lawfully sell off goods lying upon any premises demised to a tenant, unless the landlord be first paid his rent due before the execution, to the extent of one year's arrears (*w*);—and, secondly, by 56 Geo. III.

(*p*) 8 & 9 Vict. c. 127, s. 3. See Kinning's case, 10 Q. B. 730; 4 C. B. 507; Bowdler's case, 12 Q. B. 612.

(*q*) As to taking in execution, goods of which the defendant is merely a *trustee*, vide Fenwick *v.* Laycock, 2 Q. B. 108.

(*r*) 5 Rep. 92.

(*s*) Palm. 54; Pugh *v.* Griffiths, 7 A. & E. 827; Morrish *v.* Murray, 13 Mee. & W. 52.

(*t*) The sale may be by auction, or otherwise; and it is not unusual for the sheriff to hand over the goods to the execution creditor himself, at a fair valuation. See Herniman *v.* Bowker, 25 L. J. Exch. 69.

(*u*) 8 Rep. 171; vide sup. vol. I. p. 281.

(*v*) Vide sup. vol. II. p. 228.

(*w*) See Riseley *v.* Ryle, 11 Mee. & W. 17; Smallman *v.* Pollard, 6 Man. & G. 1001; Cocker *v.* Musgrove and another, 9 Q. B. 223; White *v.* Binstead, 13 C. B. 304; Wollaston *v.* Stafford, 15 C. B. 278. It is however provided, by 7 & 8 Vict.

c. 50 (*x*), no sheriff shall carry off, or sell for the purpose of being carried off, any straw, hay, manure or the like from any lands let to farm, in any case where by the covenants or agreements in the lease the carrying off of the same is prohibited between landlord and tenant, (though such produce may be lawfully sold to any person who will agree, in writing, to use and expend the same upon the lands, according to the obligation of the tenant);—and lastly, by 14 & 15 Vict c. 25, s. 2, in case the growing crops of a tenant are seized and sold in execution by the sheriff, they shall, nevertheless, be liable so long as they remain on the lands, and where there is no other sufficient distress, to be distrained upon for rent becoming due after such seizure and sale. At common law, moreover, no personal chattel could be taken under a *fi. fa.* that was not in its nature properly capable both of manual seizure and sale. But now by 1 & 2 Vict. c. 110, s. 12, it is enacted, that the sheriff may upon a *fieri facias*, (whether sued out of a superior or inferior court,) take any *money*, *bank notes*, *bills of exchange*, or other *securities for money*, belonging to the party against whom the writ is sued out (*y*), and may sue upon such bills or securities in his own name, paying over the money to be recovered thereon to the creditor. It is to be observed, that [if part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue (*z*).]

c. 96, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than four weeks' arrears of rent; and if such tenement shall be let for any other term *less than a year*, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during four such terms or times of payment. (See, in reference to these provisions, Wharton *v.* Naylor, 12 Q. B. 673.) See also in reference to the landlord's claim for rent upon an execution, under warrant from a county court, 19 & 20 Vict. c. 108, s. 75.

(*x*) See Wilmot *v.* Rose, 3 Ell. & Bl. 563.

(*y*) See Collingridge *v.* Paxton, 11 C. B. 683.

(*z*) 1 Roll. Ab. 904; Dennis *v.* Wells, Cro. Eliz. 344. We have seen, however, sup. p. 654, that he cannot, *è converso*, after the execution of a *capias*, resort to a *fieri facias*, except in the case of the defendant's death while in custody under the *capias*.

And further, that if the sheriff is unable to sell the goods at a reasonable price, he may make his return upon the writ, that they remain in his hands for want of buyers, upon which the party suing out the execution may proceed to take out a writ of *venditioni exponas;* and under this latter writ the sheriff is bound to sell them for the best price, however inadequate, that can be obtained (*a*).

3. [A third species of execution is by writ of *levari facias* (*b*), which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy] the judgment debt on the lands and goods of the party against whom it is issued, [whereby the sheriff may seize all his goods and receive the rents and profits of his lands, till satisfaction be made (*c*). Little use is now made of this writ, the remedy by elegit, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution, proper only against ecclesiastics, which is given when the sheriff, upon a common writ of *fieri facias* sued, returns *nulla bona*, and that the party is a beneficed clerk, not having any lay fee.] In this case, inasmuch as the *bona ecclesiastica* are not to be touched by lay hands, a writ goes to the bishop of the diocese, in the nature of a *levari facias* (*d*), commanding him to enter into the benefice, and take and sequester the same into his possession, and hold the same until he shall have levied the amount of the judgment out of the rents, tithes, and profits thereof (*e*); [and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the

(*a*) Keightley *v.* Birch, 3 Camp. 521.

(*b*) As to this writ when issued out of a hundred court, see Humphries *v.* Longmore, 6 C. B. 363.

(*c*) Finch, L. 471.

(*d*) Reg. Orig. 300; Judic. 22; 2 Inst. 4.

(*e*) Harding *v.* Hall, 10 Mee. & W. 42. Or the writ may command the bishop to make of the ecclesiastical goods of the party within his diocese the amount for which the judgment is recovered. The latter form of writ is called a *fi. fa. de bonis ecclesiasticis;* the form in the text, a *levari* or *sequestrari facias*. (See Dawson *v.* Symonds, 12 Q. B. 830; Arch. Pr. by Chit. (8th edit.) 1118.)

[churchwardens, to collect the same,] and after providing thereout for the offices of the church, to pay over the surplus to the judgment creditor, until the full sum due to him be raised (*f*).

4. [The fourth species of execution is by the writ of *elegit* (*g*), which is a judicial writ given by the Statute of Westminster the second, 13 Edward I. c. 18.] Before that statute, [a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last-mentioned writs of *fieri facias* or *levari facias*, but not the possession of the lands themselves, which was a natural consequence of the feudal principles,] as established in their original and stricter form, [which prohibited the alienation, and of course the encumbering, of the fief, with the debts of the owner (*h*). And when the restriction of alienation began to wear away, the consequence still continued, and no creditor could take the possession of land, but only levy the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute, therefore, granted this writ, (called an *elegit*, because it is in the choice or election of the judgment creditor, whether he will sue out this writ or one of the former,) by which the judgment debtor's goods and chattels are not sold, but only appraised: and all of them, (ex-

(*f*) 2 Burn, E. L. 329. See Bishop *v.* Hatch, 1 A. & El. 171; Pack *v.* Tarpley, 9 A. & E. 468; Harding *v.* Hall, ubi sup.; Watkins *v.* Tarpley, 17 L. J. (Q. B.) 47; Phelps *v.* St. John, 10 Exch. 895. As to the appointment of a curate to the benefice, pending its sequestration, vide 1 & 2 Vict. c. 106, s. 99. As to sequestration by the assignees of an insolvent debtor, being a beneficed clergyman or curate, 1 & 2 Vict. c. 110, s. 55; Parry *v.* Jones, 1 C. B. (N. S.) 339. As to the remedies of sequestrators, see also 12 & 13 Vict. c. 67.

(*g*) As to this writ, see Sherwood *v.* Clark, 15 Mee. & W. 764.

(*h*) Vide sup. vol. I. p. 179. But in case of a debt to the king, it appears by *Magna Charta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he being the grand superior, and ultimate proprietor of all landed estates, might seize the lands into his own hands, if anything was owing from the vassal, and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command. 3 Bl. Com. 419.

[cept oxen and beasts of the plough,) are delivered to the judgment creditor, at such reasonable appraisement and price in satisfaction of his debt.] Supposing the goods to be not sufficient (*i*), then, according to the law as it stood from the time of the passing of the Statute of Westminster until the commencement of the present reign, [the *moiety* or one half of the *freehold* lands which the judgment debtor had at the time of the judgment given (*j*), whether held in his own name or by any other in trust for him (*k*),] were also to be delivered to the judgment creditor, to hold till out of the rents and profits thereof the debt were levied, or till the judgment debtor's interest were expired. But now by 1 & 2 Vict. c. 110, s. 11, it is provided, that upon an elegit the sheriff shall deliver execution of *all* lands, tenements, and hereditaments (including those of *copyhold* or *customary* tenure), which the judgment debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any *disposing power* which he might, without the assent of any other person, exercise for his own benefit (*l*). [This execution or seizing of lands by elegit is of so high a nature that after it the body of the defendant cannot be taken (*m*); but if execution can only be had of the goods, (because there are no lands,) and such goods are not suffi-

(*i*) 2 Inst. 395.

(*j*) Ibid.

(*k*) 29 Car. 2, c. 3.

(*l*) Vide sup. p. 642. See the form of this writ in Lush's Pr. Appendix, Nos. 5 and 9, 2nd edit. An *elegit* is always *returned* by the sheriff; (that is, the writ is filed in court after its execution, showing what has been done upon it;) and in this respect it differs from a *ca. sa.* and *fi. fa.*; for those writs are not usually returned by the sheriff, unless he is *ruled* to do so. When upon the *elegit* it is returned that land has been delivered to the plaintiff, he is entitled at once, (subject to the estates of any parties which commenced before the judgment,) to enter such land (peaceably), or, if necessary, to recover it by ejectment, after which he is *tenant by elegit*; as to whose estate, vide sup. vol. I. p. 310. (Lush, Pr. 444, 470, 2nd ed.)

(*m*) See Queen *v.* Derbyshire, &c. Railway Company, 3 Ell. & Bl. 784.

[cient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*, for such *elegit* is in this case no more than a *fieri facias* (*n*). So that body and goods may be taken in execution, or land and goods, but not body and land too, upon any judgment between subject and subject.]

Besides these writs of execution, the judgment creditor is enabled, by the 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, to resort to other modes of proceeding to enforce payment out of a species of property which none of these writs can in their nature conveniently reach. For, on the application of any creditor, who has entered up judgment in one of the superior courts at Westminster, a judge of any such court may, by these statutes, order that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, whether standing in his own name or the name of any person in trust for him, shall stand *charged* with the payment of the amount for which judgment shall have been recovered, with interest, so as to give the judgment creditor the same remedies as if the charge had been made in his favour, by the judgment debtor; provided, however, that no proceedings shall be taken in order to have the benefit of such charge, till after six calendar months from the date of the order; and further, that if the judgment creditor, after obtaining such charge, or any other charge or security, under the powers of that Act, shall afterwards, and before the realization of the property, take the person of the debtor in execution upon the same judgment, he shall be deemed to have relinquished his charge or security (*o*). And for like aid of the judgment creditor, it is also now provided by 17 & 18 Vict. c. 125, ss. 60—67 (*p*), that he may apply to the court or a

(*n*) Hob. 58. After a *fieri facias* (it will be recollected), a *capias ad satisfaciendum* may be had. Vide sup. p. 658.

(*o*) As to these provisions, see Brown *v.* Bamford, 9 Mee. & W. 42; Churchill *v.* Bank of England, 11 Mee. & W. 323; Rogers *v.* Holloway, 5 Man. & G. 292; Witham *v.* Lynch, 1 Exch. 391; Robinson *v.* Burbige, 1 L. M. & P. 94; Graham *v.* Connell, ib. 438; Watts *v.* Porter, 3 Ell. & Bl. 743.

(*p*) As to these provisions, see the following cases which have arisen on

judge for a rule or order to have the debtor orally examined as to the debts owing to him by any third person; and may also apply to a judge for an order that all debts due from any third person, (called the *garnishee*,) to the judgment debtor, be *attached* to answer the judgment debt:—the service of which order shall bind the debts in the garnishee's hands (*q*). The Act also provides, that if the garnishee fails to appear upon summons to show cause why he should not pay the judgment creditor the debts attached, or so much as will suffice to pay the judgment debt,—or if, on appearance, he fails to make such payment forthwith, and yet does not dispute the debt alleged to be due from him, the judge may order execution against him for the amount; and that if on the other hand he does dispute his liability, the judge may order that the judgment creditor be at liberty to proceed against him, by a writ of the same nature as the *writ of revivor*, to which we are about presently to advert (*r*).

[These are the methods which the law of England has pointed out for the execution of judgments] in their ordinary course; [and when the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process or otherwise, *satisfaction* ought to be *entered on record* (*s*), that the debtor may not be liable to be hereafter harassed a second time on the same account.]

their construction:—Innes *v.* East India Company, 17 C. B. 351; Lockwood *v.* Nash, 18 C. B. 536; Mason *v.* Muggeridge, ib. 642; Hirsch *v.* Coates, ib. 757; Holmes *v.* Tutton, 5 Ell. & Bl. 65; Jones *v.* Jenner, 25 L. J. (Exch.) 319; Johnson *v.* Diamond, 11 Exch. 431.

(*q*) A somewhat similar proceeding has been immemorially used in the cities of London and Bristol, under the name of *foreign attachment*, as to which see Wadsworth *v.* Queen of Spain, 17 Q. B. 171; Bastow *v.* Gant, 21 L. J. N. S. (Q. B.) 377; Lush's Pract. p. 472, 2nd ed.; The Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), ss. 5, 18, 47.

(*r*) Vide post, p. 665.

(*s*) As to entry of satisfaction on the roll, see Reg. Gen. Hil. T. 1853, (Pr.) r. 80; E. T. 1857.

And here our summary account of a suit at law is brought to its proper close. But before we conclude the chapter, it is right to take notice of certain supplementary-proceedings which are often incidental to, or follow upon, a suit.

I. *The motion by way of interpleader*; or, as it may be otherwise called, motion for relief from adverse claims. It often happens that a man finds himself exposed to the adverse claims of two opposite parties, each requiring him to pay a certain sum of money, or to deliver certain goods; and that he is unable to comply safely with the requisition of either, because a reasonable doubt exists to which of them the property in truth belongs. Until lately, a person so circumstanced, had no means of relief except in a court of equity, by a proceeding there, called a bill of interpleader, which was attended with considerable expense and delay. But by 1 & 2 Will. IV. c. 58 (*t*), it is now provided, that upon application made on behalf of any defendant sued in any of the superior courts at Westminster, or the Courts of Pleas of the Counties Palatine, in any action of assumpsit, debt, detinue, or trover, (such application being made after declaration, and before plea,) showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed by, or supposed to belong to, some third party, who has sued, or is expected to sue, for the same, and that the defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court or any judge thereof may direct—it shall be lawful for the court or a judge to make rules and orders calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish the same; and if he maintains it, to make himself defendant in the same action or otherwise; or, with the

(*t*) See also 1 & 2 Vict. c. 45, s. 2.

consent of the plaintiff and such third party, the court or a judge may dispose of the question between them, in a summary manner (*u*).

II. The *writ of revivor* is ancillary to the judgment in an action; resort being had to it when the circumstances are such that the law no longer allows the judgment to be enforced by a writ of execution as of course, but deems it reasonable to summon the party charged into court, in order to give him an opportunity of being heard before execution issues. Formerly the writ used for this purpose was a *scire facias;* which, like the writs of execution, were at that time always directed to the sheriff; and it was by him that the defendant was to be summoned; but in lieu of this a writ of revivor, (being indeed substantially the same thing, except as regards the sheriff's intervention,) has been substituted by the statute 15 & 16 Vict. c. 76 (*v*), which also provides that this latter writ shall be in a form prescribed, and shall be directed to the defendant himself, and proceeded upon in the same manner as a writ of summons in an ordinary action (*w*).

The circumstances under which a writ of revivor issues

(*u*) By the same statute a similar protection is afforded to sheriffs and other officers, who, under the process of the court, are called upon to seize the goods of any person, and are afterwards sued, or find themselves in danger of being sued, by some third party claiming property in the same goods. As to interpleader, see Teggin *v.* Langford, 10 Mee. & W. 557; Johnson *v.* Shaw, 4 Man. & G. 916; Lindsey *v.* Barron, 6 C. B. 291; Patorni *v.* Campbell, 1 Dowl. & L. 397; Goldschmidt *v.* Hamlet, 6 Man. & G. 187; Candy *v.* Maugham, ibid. 710; Fenwick *v.* Laycock, 3 Q. B. 108; King *v.* Simmonds, 7 Q. B. 289; Turner *v.* Kendal, 13 Mee. & W. 171; Slaney *v.* Sidney, 14 Mee. & W. 800; Cobbett *v.* Richards, 15 Mee. & W. 194; Hollier *v.* Laurie, 3 C. B. 334; Williams *v.* Crosling, ib. 957; Mutton *v.* Young, 4 C. B. 371; Crump *v.* Day, ib. 760; Webster *v.* Delafield, 7 C. B. 187; Day *v.* Carr, 7 Exch. 883; Winter *v.* Bartholomew, 11 Exch. 704. And as to interpleader in inferior courts, 7 & 8 Vict. c. 96, s. 28, and 9 & 10 Vict. c. 95, s. 118; Beswick *v.* Boffey, 9 Exch. 315.

(*v*) Sect. 129.

(*w*) Sect. 131.

are always of a kind connected either with lapse of time or change of parties.

1. As to lapse of time. It was the rule of the common law that all writs of execution [must be sued out within a year and a day after the judgment is entered,] for otherwise a presumption was deemed to arise that the judgment was satisfied. But after the year and day the claimant was still allowed (and originally by provision of the Statute of Westminster the second, 13 Edw. I. c. 45) to issue a *scire facias*, calling on the defendant to show cause why execution should not issue. This period of a year and a day is now extended by the statute of 15 & 16 Vict., just mentioned, to six years (*w*). But after the expiration of the six years, execution, as of course, is still (as formerly after the expiration of a year and day) disallowed. The party desiring to have execution must either apply to the court or a judge for leave to enter a *suggestion* on the roll, to the effect that it manifestly appears to the court that he is entitled to execution (*x*); (which suggestion the court or judge, upon hearing both parties, will allow to be entered, and order execution accordingly, supposing the right to be manifest);—or otherwise the applicant must have recourse to a writ of revivor, or to an action on the judgment (*y*). The writ of revivor, if the judgment be less than ten years old, will be issued as a matter of course; if more than ten years old, only on a rule of court or judge's order; if more than fifteen, only after a rule to show cause (*z*).

2. As to change of parties (*a*). This may occur, 1, in the case of *death*. And here the rule formerly was, that if either plaintiff or defendant died before final judgment, the action would abate; and that if either died after the judgment and before it was satisfied, a *scire facias* by or against the representatives of the party deceased (as the case might

(*w*) 15 & 16 Vict. c. 76, s. 128.

(*x*) Sect. 129.

(*y*) Sect. 130.

(*z*) Sect. 134.

(*a*) See Underhill *v.* Devereux, 2 Saund. by Wms. 72 b, g; Bosanquet *v.* Ransford, 11 A. & E. 520; Whittenbury *v.* Law, 6 Bing. N. C. 345.

be) was requisite in order to enforce the judgment. By 17 Car. 2, c. 8, however, it was provided, that the death of neither party between verdict and judgment should abate the suit, so as the judgment were entered within two terms after the verdict (*b*), but that the suit might be revived by *scire facias* (*c*); and by 8 & 9 Will. III. c. 11, that where a sole plaintiff or defendant died after interlocutory and before final judgment, (and the right of action survived (*d*),) the plaintiff or his representatives might proceed by *scire facias* against the defendant or his representatives, (as the case might be); and that where one of several plaintiffs or defendants died at any stage of the suit, (and the right of action survived,) it might, even without a *scire facias*, be prosecuted by the surviving plaintiff or plaintiffs against the surviving defendant or defendants, no more being required in that case than to enter a suggestion of such death upon the record (*e*). And now by 15 & 16 Vict. c. 76, it is enacted generally, that the death of a plaintiff or defendant shall not cause the action to abate; but that the proceedings, (supposing the right of action to survive,) shall be continued at suit of, and against, the proper party or parties (*f*);—in the case of the death of a sole plaintiff or defendant before judgment, or of one of several plaintiffs or defendants by a suggestion of the fact on the record (*g*);—and in the case of the death of a sole plaintiff or defendant after an interlocutory and before final judgment, by a writ of revivor at suit of the plaintiff or his representatives, against the defendant or his representatives, as the case may be (*h*). 2. In the case of *marriage*. Where a female plaintiff or defend-

(*b*) By 15 & 16 Vict. c. 76, s. 139, it is also now provided, that the death of neither party between verdict and judgment shall be alleged for error,—so as such judgment be entered within two terms after such verdict.

(*c*) See Earl *v.* Brown, 1 Wils. 302; Wright *v.* Madocks, 8 Q. B. 119.

(*d*) Vide sup. p. 455.

(*e*) See Rolt *v.* Mayor *v.* Gravesend, 7 C. B. 777.

(*f*) Sect. 135; et vide 17 & 18 Vict. c. 125, s. 92.

(*g*) 15 & 16 Vict. c.76, ss. 136, 137, 138.

(*h*) Sect. 140.

ant married before judgment was obtained, the action would formerly in general abate (*i*); and if the marriage was after judgment and before execution, a *scire facias*, at suit of or against the husband and wife, (as the case might be,) was requisite in order to enforce the judgment (*j*). But by the statute just mentioned, the action shall no longer abate, but be continued to judgment; and the judgment and execution, against a female defendant under such circumstances,—may either be against her alone, or (by suggestion or writ of revivor pursuant to the Act, against the husband and wife jointly): or if the judgment be in favour of a female plaintiff so circumstanced,—execution may be issued by authority of the husband, and without any suggestion or writ of revivor (*k*). 3. In the case of *bankruptcy* or *insolvency*. Where a plaintiff became bankrupt or insolvent after he had obtained judgment and before execution, it was formerly requisite, in order to obtain execution, that a *scire facias* should issue in the name of his assignees (*l*). But by the same statute, the course of proceeding is now either to sue out a writ of revivor, or apply for leave to enter a suggestion of the kind already described (*m*).

III. As to the writ of *scire facias*, it is used in a variety of instances in the law—in some of them as an independent and original proceeding (*n*), in others as supplementary to an action; in which latter case it is sued out of the court in which that action was brought. In its latter application,

(*i*) Walker *v.* Goslin, 11 Mee. & W. 78.

(*j*) Underhill *v.* Devereux, 2 Saund. by Wms. 72 k.

(*k*) 15 & 16 Vict. c. 76, s. 141.

(*l*) Winter *v.* Kretchman, 2 T. R. 45.

(*m*) 15 & 16 Vict. c. 76, s. 129. See also the provision in sect. 142, that the bankruptcy of the plaintiff shall not be pleaded in bar in any action which the assignees may maintain for the benefit of the creditors, unless the assignees shall refuse to continue the action and give security for the costs.

(*n*) Among these is the case of *scire facias* for repealing a patent; as to which, vide 12 & 13 Vict. c. 109, s. 29; 15 & 16 Vict. c. 83, s. 15; sup. vol. II. p. 33; post, vol. IV. ss. 62, 70.

indeed, it is now much more confined than formerly, being supplanted, (as before remarked,) by a writ of revivor, in all those cases in which it becomes necessary to revive a judgment, by reason either of lapse of time, or change of parties. It is still, however, the proper writ in several other cases of a supplementary kind to which the writ of revivor has no application; for example, that of proceeding against bail on their recognizance (*o*), or for restitution after a reversal in error (*p*). But where in any case a *scire facias* still issues out of the superior courts of common law, it is now provided, in general, that it shall be directed and proceeded upon in like manner as a writ of revivor (*q*). We need only add, therefore, on this subject, that it is a settled rule as to a *scire facias*, (and the same rule applies, it is presumed, to a writ of revivor,) that the defendant in such a proceeding, when supplementary to an action, shall never be allowed to plead any matter which he had an opportunity of pleading to that action (*r*). For the object of the proceeding is not to afford him the means of bringing the original judgment into question, but of showing, if he can, that some matter has occurred since the judgment was given, which entitles him to be relieved from the execution.

(*o*) Vide sup. p. 655.

(*p*) See 15 & 16 Vict. c. 76, s. 132.

(*q*) Sect. 132. This section enumerates a variety of cases of this description; and the enumeration seems to comprise nearly the whole of those in which a *scire facias* may now issue out of the courts in question. As to costs on a *scire facias* see 8 & 9 Will. 3, c. 11, s. 3; 3 & 4 Will. 4, c. 42, s. 34. As to plaintiff's moving to quash his own writ of *scire facias* or revivor, see Reg. Gen. Hil. T. 1853, (Pr.) r. 78.

(*r*) Underhill *v.* Devereux, 2 Saund. by Wms. 72 t. See Baylis *v.* Hayward, A. & E. 256; Fowler *v.* Rickerby, 2 Man. & G. 760; Gordon *v.* Official Manager of Royal British Bank, 5 W. R. (Exch.) 283.

CHAPTER XI.

OF THE PROCEEDINGS IN SOME PARTICULAR ACTIONS.

Having now taken a compendious though comprehensive view of the course of proceeding in actions in general, it becomes necessary to advert to some varieties upon that course, exhibited in the case of particular actions; as to which however it is to be understood that their deviation from the regular system is confined, in general, to the instances we are about to specify, and that in other respects they are conducted in conformity to that system. The particular actions in question are those of *dower* (*a*), *quare impedit* (*b*), *replevin* (*c*), and *ejectment* (*d*).

1. We will begin then with the action of *dower*, intending by this, the principal species of dower *unde nihil habet;* for as regards the writ of right of dower (*e*), it is so entirely out of use as to supersede the necessity of giving any account of its practice, and it is enough to say of it that, supposing such an action to be brought, it would, as a real action, vary in certain respects from the ordinary course of proceeding in an action personal, as delineated in the last chapter, and be more nearly analogous to that which we are now about to describe.

With respect to *dower unde nihil habet* its proceedings are as follows (*f*).

(*a*) Vide sup. pp. 448, 485.

(*b*) Vide sup. pp. 448, 486, 506.

(*c*) Vide sup. pp. 351, 381, n. (*x*); 449, 451, 510—512.

(*d*) Vide sup. pp. 448, 481, 485, 486.

(*e*) Vide sup. pp. 448, 485.

(*f*) A full description of these will be found in William *v.* Gwyn, 2 Saund. by Wms. 43—45 a.

It commences not by summons, but by original writ, this being the method invariably pursued in that antient class of real and mixed actions (*g*), of which it is one of the few remaining species. Of the nature of an original writ, some account has already been given (*h*); and it has been shown, that it is sued out of the Court of Chancery, under the Great Seal, directed to the sheriff of the county, and made returnable into the court in which the action is intended to be brought. To this we may now add, that both the original writ itself, and all subsequent process founded upon it, must have fifteen days between the *teste* and return (*i*). In dower, (according to the practice that has immemorially prevailed in real and mixed actions,) it must be made returnable into the Common Pleas, and into no other court. After it has been sued out and delivered to the sheriff, he directs his bailiff to summon the defendant (or *tenant*, as he is called in a real action); which is accordingly done by sticking up and leaving on the premises, out of which the dower is claimed (*k*), the form of a written summons. But to secure notice to the tenant, it is enacted by 31 Eliz. c. 3, s. 2, that after every summons in any real action, fourteen days at least before the return of the original writ, proclamation of the summons shall be made on a Sunday immediately after divine service and sermon, if any sermon there be, but if none, then forthwith after divine service, at or near to the most usual door of the parish church or chapel of the parish or town where the

(*g*) The new form of process provided by the Common Law Procedure Act, 15 & 16 Vict. c. 76, applies to *personal* actions only, sect. 2.

(*h*) Vide sup. p. 558.

(*i*) It was also formerly necessary that an original writ and all subsequent process thereon should be made returnable on a *general* return day, there being several days in the Term so denominated by way of distinction from the rest. But now, by 1 Will. 4, c. 3, s. 2, all writs that had been usually returnable on general return days may be made returnable on the third day exclusive before the commencement of each Term, or on any day, (not being Sunday,) between that day and the third day exclusive before the last day of the Term.

(*k*) See Garrard v. Tuck, 8 C. B. 231.

lands lie. And now by 7 Will. IV. & 1 Vict. c. 45, such proclamation (like all others theretofore made in churches) shall be reduced to writing or print, and, instead of being proclaimed in church, shall be affixed, immediately before divine service, on or near the church doors.

On the return of the original writ into the Court of Common Pleas, the tenant is entitled to *cast an essoign;* that is, allege an excuse, (whether in fact there be any ground for it or not,) for his failing to appear (*n*); which leads necessarily to an adjournment of the cause for a certain period. If after this, the tenant fails to appear on the day given by the adjournment, or if he has failed to appear at the return of the writ, and cast no essoign, the plaintiff or, (as she is called in dower,) demandant, is to sue out a further writ of process called a *grand cape* (*o*), which commands the sheriff to take the third part of the lands in which dower is claimed, into the hands of the Crown, and summon the tenant to answer on such a day, for his default. If on the return of the grand cape there is no appearance, the demandant is entitled to judgment; but if, on the other hand, the tenant appears, the demandant waives the default, and accepts the appearance. In this case, or supposing the tenant to appear on the return of the original, and to cast no essoign, or to have appeared, after casting an essoign, on the day of adjournment given, the demandant is then to *count*, (which is equivalent to *declaring* in an action personal or mixed (*p*),) and by her count, is to make demand, in general terms, of the third part of the lands of her deceased husband.

(*n*) As to essoigns, see Twining *v.* Lowndes, 10 Bing. 65.

(*o*) In case of default *after* appearance a writ of *petit cape* issues instead of a *grand cape*, but the difference is otherwise little more than nominal. Roscoe on Real Actions, 282.

(*p*) It would seem that the provisions of 15 & 16 Vict. c. 76, s. 54, with respect to the manner of *intituling* the pleadings (vide sup. p. 569), do not apply to dower and *quare impedit*, and that in these the pleadings are consequently to be intituled according to the form universally in use in former times, viz. thus,—"In the Queen's Bench" [*or* "Common Pleas," *or* "Exchequer"], —— Term, in the —— year of Queen Victoria.

The tenant is then, as in other actions, to plead or demur; and his plea may be either dilatory or in bar; and his plea in bar must either traverse, or confess and avoid. Among the pleas in bar peculiar to this action, is that of *ne unques seisie que dower*, viz. that the demandant's husband was never seised of such an estate in the lands in question as could give the demandant a legal claim to dower; another is *ne unques accouple en loial matrimonie*, viz. that the demandant and her supposed husband were never joined in lawful matrimony: another, that the husband is still living, another, that the demandant eloped from her husband and lived in adultery with another person (*q*); and another is *tout temps prist*, viz. that from the death of the husband the tenant has always been and still is ready to render the demandant her dower, and rendereth the same into the court (*r*). The replication and subsequent pleadings follow in the same manner as in a personal action. To the plea of *ne unques accouple*, the demandant may reply that she was married at such a place, in such a diocese; on which it has been the course to award a trial by certificate (*s*); the court sending to the bishop of that diocese to certify whether there was a marriage or not. To the plea that her husband is still living, she may reply his death; and the issue thereon shall be tried by witnesses (*t*); but all other issues are triable by jury (*u*); and the practice as to summoning the jury and subsequent proceedings, is in general the same as in personal actions.

At the common law there were no *damages* or *costs* in dower; but by the statute of Merton, (20 Hen. III. c. 1,) it is enacted, that if a widow shall recover her dower of the lands whereof her husband died seised, the tenant shall

(*q*) Hetherington *v.* Graham, 6 Bing. 135.

(*r*) As to this plea, see Sarah Watson, *dem.* John Watson, *ten.*, 10 C. B. 3.

(*s*) As to trial of marriage by certificate of the bishop, as the law now stands, vide sup. p. 586, n. (*q*).

(*t*) As to the trial by witnesses, vide sup. p. 587.

(*u*) Roscoe, 222, 300.

yield damages, that is to say, the value of the dower from the time of the death of her husband, until the day she shall have judgment to recover seisin; and by the statute of Gloucester, (6 Edw. I. c. 1,) which gives costs in all cases where the party is entitled to damages, and by the subsequent statutes of 4 Jac. I. c. 3, and 8 & 9 Will. III. c. 11, costs are now recoverable by the successful party, (whether demandant or tenant,) in this action. If the jury find a verdict for the demandant, they ought also to find, 1, that her husband died seised, and also of what estate, and the time of his death; 2, the annual value of the land; 3, the amount of damages she has sustained by the detention of her dower. And the judgment in this action, when given for the demandant, is, that she recover seisin of a third part of the tenements in demand, to be set forth by metes and bounds, together with the damages and costs (x).

II. *Quare impedit* (y) is also of the class of real and mixed actions; and consequently commences, like the last, by original writ, returnable into the Common Pleas only (z). The original writ of *quare impedit* directs the sheriff to command the defendants who disturb the presentation, (that is, in general, the bishop, patron and clerk,) to permit the plaintiff to present a fit person,) without specifying whom,) to such a vacant church which he claims to be in his gift, and his presentation to which the defendants unjustly hinder; and unless they so do, then to appear in court on such a day, to show why they hinder him (a). The subsequent course,

(x) William v. Gwyn, 2 Saund. by Wms. 44 e.

(y) Vide sup. p. 448, 486, 505. See Tolson v. Bishop of Carlisle, 3 C. B. 41; 5 C. B. 761.

(z) At the suit of the *Crown*, however, it may be returnable into the Court of Queen's Bench, vide sup. pp. 451, 452, 671.

(a) "Immediately on the suing out "of the *quare impedit*," says Blackstone, "if the plaintiff suspects that "the bishop will admit the defendant "or any other clerk pending the suit, "he may have a prohibitory writ, "called a *ne admittas*," and "if the "bishop doth, after the receipt of "this writ, admit any person, even "though the patron's right may have "been found in a *jure patronatus*, "then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if "the clerk of a stranger, by *scire*

though partly agreeing, is yet in some respects different from that in dower; for first, the summons on the original is to be served on the defendants, either personally, or by fixing it to the church door of the benefice to which the suit relates (*b*); secondly, no proclamation is required under the act of Elizabeth; and lastly, if the defendant do not either appear or cast an essoign, at the return of the original writ, or if, after casting an essoign, he do not appear at the adjournment day, there issues, instead of a grand cape, a writ of *attachment*, commanding the sheriff to put the defendants by gages and safe pledges to answer for their default; and if no appearance be entered in due time to this, then a writ of *grand distress* (*c*), commanding the sheriff to distrain the defendants, by all their lands and chattels in his bailiwick, in order to compel their appearance. By common law this was a distress infinite, that is, *distringas* after *distringas* was sued out, and issues levied on each, until the defendants appeared (*d*): but by the statute of Marlbridge, (52 Hen. III. c. 12,) if the defendants do not appear at the return of the first *distringas*, the plaintiff should have judgment by default (*e*).

" *facias*, and shall have a special " action against the bishop, called a " *quare incumbravit*, to recover the " presentation, and also satisfaction " in damages for the injury done him " by incumbering the church with a " clerk, pending the suit, and after " the *ne admittas* received."—(3 Bl. Com. 248.) The *quare incumbravit*, however, being a real action, is now abolished by 3 & 4 Will. 4, c. 27; and it would seem that there is no necessity for a *ne admittas*, where all proper parties have been made defendants in the *quare impedit*; for if the bishop be a defendant, no lapse can occur *pendente brevi*, (Wats. C. L. 112;) and if the clerk, then, though he was admitted prior or pending the *quare impedit*, he is removed by the mere effect of the judgment in that action. (Ibid. 289, 290.) And as to any person who has been admitted, and is no party to the *quare impedit*, it is said that he may be removed (unless his title be good) by a writ of *scire facias*, founded on the judgment in *quare impedit*. (Ibid. 299.)

(*b*) Roscoe on Real Actions, 148; Arch. Pl. 436; Searl *v.* Long, 2 Mod. 264; but see the authorities cited Tyrrell *v.* Jenner, 6 Bing. 285, that personal service is not regular.

(*c*) Vide Tyrrell *v.* Jenner, ubi sup.

(*d*) 2 Inst. 124; Arch. Pl. 437.

(*e*) It is said, however, that before execution can be awarded, the plaintiff must make title; as to which see Arch. Pl. 437.

Supposing, on the other hand, the defendants to appear to the process, the plaintiff is then to declare (*f*); and in his declaration must show a title in himself or his ancestors, or those under whom he claims,—an actual presentation under that title,—and a disturbance before the action brought (*g*). [Upon this, the bishop and the clerk usually disclaim all title, save only, the one as *ordinary* to admit and institute, and the other as presentee of the patron; who is left to defend his own right.] Indeed it was a rule at the common law, that neither the ordinary nor clerk were at liberty to plead to the right of patronage, as neither of them had any thing therein; but by 25 Edw. III. st. 3, c. 7, the ordinary may now do so, provided he have himself collated by lapse, and the clerk, if he have been collated, or presented and instituted (*h*); that is, they may respectively defend their own right so to collate, or be instituted. They may each also plead certain dilatory pleas (*i*); or if they mean to deny that they have obstructed the presentation, they may each plead in bar the general issue *ne disturba pas* (*k*), and as this does not deny the right of the plaintiff, it entitles him, so far as these defendants are concerned, to immediate judgment to recover his presentation; though he has also the option of maintaining, if he thinks fit, that a disturbance has in fact been committed, which, if proved, will give him a right to recover damages. The bishop may also plead in bar, that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*l*). The patron, also, is entitled to resort to certain dilatory pleas (*m*); or

(*f*) As to the time for declaring in *quare impedit*, see Barnes *v.* Jackson, 1 Bing. N. C. 545.

(*g*) Brickhead *v.* Archbishop of York, Hob. 250.

(*h*) 7 Rep. 26 a; Elvis *v.* Archbishop of York, Hob. 392; Queen and Middleton's case, 1 Leon. 45; Apperley *v.* Bishop of Hereford, 9 Bing. 681; Storie *v.* Bishop of Winchester, 9 C. B. 62; 17 C. B. 653; Roscoe on Real Actions, 231, 239, 241.

(*i*) Com. Dig. Abatement.

(*k*) Colt *v.* Bishop of Coventry, Hob. 193; R. *v.* Bishop of Worcester, Vaughan, 58.

(*l*) Vide sup. p. 28.

(*m*) Com. Dig. Abatement, H. 19, H. 23.

may plead *plenarty*, viz., that the church has been full for six calendar months before the issue of the original writ, by virtue of his own presentation (*n*); or may plead, like the ordinary and clerk, and with the same effect, the general issue of *ne disturba pas* (*o*); or may traverse the title alleged by the plaintiff in his declaration. Here, however, this difference is to be observed, that though, as a mere answer to the action, such traverse is a sufficient plea, yet it may be often necessary to go further; for in a *quare impedit* both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk: if, therefore, the patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, (which will naturally be the case, unless he has presented, and his clerk has been actually admitted,) he must, in addition to the traverse, set forth some matter showing title in himself (*p*).

The trial in *quare impedit* is in several instances by certificate (*q*); but in general by jury. And upon the failure of the plaintiff at the trial, in making out his title, the defendant is put upon the proof of *his*, if title has been asserted by his plea. If the right be found for the plaintiff, three further points are also to be inquired into,—1. Whether the church be full or not; and if it be, upon whose presentation it is full;—2. The yearly value of the church;—3. Whether six calendar months have passed

(*n*) Stat. Westm. 2, c. 5, vide sup. p. 508. A question is made in Roscoe on Real Actions, (p. 234,) as to the effect that the statute of 7 Anne, c. 18, has had as to a plea of plenarty. It is laid down that the *clerk* also may plead plenarty, but then he must show that the presentation was a lawful title. Lister *v.* Crameel, Noy, 30; S. C. 1 Brownl. 162; Roscoe on Real Actions, 240.

(*o*) Colt *v.* Bishop of Coventry, ubi sup.; R. *v.* Bishop of Worcester, ubi sup.

(*p*) Vaughan, 7, 8.

(*q*) Vide sup. p. 584. See also Roscoe on Real Actions, 503; where it is said that not only the issue on the *ability of the plaintiff's clerk*, if the clerk be alive, must be tried by certificate, but also the issue upon *institution, deprivation, resignation*, or *plenarty*.

since the avoidance;—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff may be entitled (r). For at common law no damages were recoverable in a *quare impedit*; but by the statute of Westminster the second, (13 Edw. I. c. 5,) if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop has presented by lapse, and the true patron has lost his presentation, damages shall be adjudged against the disturber, to the amount of the value of the church for two years; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (s).

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (t); and also that he recover his damages and costs; and the judgment for the defendant, where he has made out his own title to present, is, with the exception of the damages, the *same* (u). No

(r) 2 Inst. 362; 6 Rep. 49 a; Poyner v. Chorleton, Dy. 184 b; 3 Bl. Com. 249.

(s) 6 Rep. 51 a; 2 Inst. 362; Henslow v. Bishop of Sarum, Dy. 76 b. An additional reason is given in the books (see Wats. C. L. 291), as far as regards the first point, viz. that unless this is ascertained, it will not appear whether the plaintiff is entitled to recover his presentation; because the church may be full upon the presentation of some stranger, not party to the *quare impedit*, and whose title may be better than the plaintiff's. According to Blackstone, (vol. iii. p. 249,) the reason for inquiry into the third point, (which he describes as whether six calendar months have passed *between the avoidance and the time of bringing the action*) is, that if that period of time has passed, the case "would not be "within the statute, which permits "an usurpation to be divested by a "*quare impedit* brought *infra tempus* "*semestre*." As to that statute, vide sup. pp. 505, 506.

(t) F. N. B. 38.

(u) Wats. C. L. 295. If the bishop, upon receiving the writ *ad admittendum clericum*, says Blackstone, does not admit the plaintiff's clerk, the latter may sue him in a *quare non admisit*, and recover satisfaction in damages. (3 Bl. Com. 250.) And this writ would seem still to lie; for as the judgment in it is only to recover damages (F. N. B. 47), it is conceived not to be a real action. Perhaps, however, such a writ is rarely or never necessary;

costs, indeed, were recoverable by either party, in *quare impedit*, until a recent period (*x*). But by 4 & 5 Will. IV. c. 39, it is now enacted, that where a verdict is given for the plaintiff, he shall have his costs in addition to his damages; and where a verdict is given against him, or he shall discontinue, or be nonsuited, he shall pay costs to the adverse party; but subject to a proviso, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, (or, where there is no trial by jury, the court at large,) shall certify that he had probable cause for defending the action; it being however declared, that in no case, where the defence shall be grounded on a presentation or collation previously made, shall such presentation or collation be deemed as a probable cause of defence within the meaning of the proviso.

III. In *replevin* (*y*), also, the course of proceeding was, formerly (*z*), by original writ, though of a description different from that in dower and *quare impedit*; as it directed the sheriff not to summon the defendant into any of the superior courts at Westminster, but to replevy the goods, and determine the matter in the common law county court incident to his own jurisdiction. But this mode became obsolete; the course having been introduced by several antient statutes (*a*), of *levying a plaint* in such court, *without original writ*, and thereon obtaining from the sheriff a replevin of them. It has been shown, however, in a former place (*b*), that this method has now

for it is said that a bishop refusing to execute the writ *ad admittendum clericum*, or making an insufficient return to it, may be *fined*. Wats. C. L. 302.

(*x*) Edwards *v.* Bishop of Exeter, 6 Bing. N. C. 146.

(*y*) Vide sup. pp. 351, 381, n. (*x*), 449, 451, 510—512. See also the following cases, Mennie *v.* Blake, 25 L. J. (Q. B.) 399; Tummons *v.* Ogle, ibid. 403; Jamieson *v.* Trevelyan, 10 Exch. 748.

(*z*) Vide sup. p. 512, n. (*r*).

(*a*) Stat. of Marlbridge, 52 Hen. 3, c. 21; Stat. of Westm. 13 Edw. 1, c. 2; 1 Ph. & M. c. 12.

(*b*) Vide sup. p. 511.

in turn been superseded by the new County Court Acts, directing the application for a replevin in cases of distress for rent in arrear, or for damage feasant, to be made to the Registrar of the county court within the district of which the distress was taken, and giving the owner of the goods the option of commencing this action of replevin either in the county court, or in one of the superior courts of the common law; and if he commence it in the former, the option also of *removing* it by *certiorari*, to one of the latter courts. To this we have now to add, that if the replevin be commenced in a superior court, the course of proceeding for that purpose is to be the same that is observed there, in any other personal action (*c*). If, on the other hand, it is *removed* to a superior court after being commenced in the county court, the sheriff, to whom the writ of *certiorari* is directed, must summon the defendant to appear in the superior court, on the day when it is returnable (*d*). Before the end of the second Term after this return day, the writ, with its return, must be filed in the superior court; and if the defendant does not appear, the plaintiff obtains a rule calling upon him to do so; which expires in four days; and if he fails to comply, there is a process by *pone per vadios*, and after that by *distringas*, or, if necessary, by repeated writs of *distringas;* upon which issues may be levied from time to time, until the appearance is effected (*e*).

Upon appearance, the next step is for the plaintiff to declare; and if he omits to do so in due time, the defendant may sign judgment of *non pros.* The declaration (which states in general terms the taking of the goods in a certain place,) being delivered, the subsequent course of pleading differs from that in other personal actions, chiefly in the following particular: that the defendant's plea may not only tend to his acquittal or discharge from the action,

(*c*) 19 & 20 Vict. c. 108, s. 65.

(*d*) See Davies *v.* James, 1 T. R. 373.

(*e*) Roscoe on Real Actions, p. 629.

(*f*) Ibid. p. 630.

but may claim a *return* of the goods (*g*), admitting that they were taken, but insisting that they were lawfully taken, as a distress. Such a plea is called an *avowry*, or (if the distress was made, not in his own right, but as servant for another,) a *cognizance*; and the plaintiff's next pleading is called a *plea in bar*; which the defendant answers by a *replication*; and so to the end of the series; the names of all the pleadings subsequent to the avowry or cognizance being thus transposed and thrown into a reversed order from that in which they stand in ordinary cases. Also, where the distress was for rent, the statute 11 Geo. II. c. 19, gives the defendant the power of resorting to a *general* form of avowry or cognizance; a provision introduced to protect landlords from the inconvenience of specially setting forth their title. Instead of an avowry or cognizance, however, the defendant may plead in abatement or bar, which will be followed by a replication on the part of the plaintiff, according to the ordinary course of pleading. Thus, the defendant may plead in bar *non cepit*; viz., that he did not take the goods; which is considered as the general issue in replevin. And it is further to be understood, that the defendant is entitled to make several avowries, and both to avow and demur; and that each party has similar rights throughout the whole series of pleading, according to the principle now generally established in ordinary actions.

The issue may be made up either by plaintiff or defendant (*h*); for as the defendant, in case of a judgment in his favour, may obtain a return of the goods, both parties are considered as in a manner plaintiffs,—a circumstance in which this action is analogous to that of *quare impedit* (*i*). As to the judgment, it awards, when given in favour of the

(*g*) It is not necessary, however, that it should *conclude* with a claim of a return; it being provided by 15 & 16 Vict. c. 76, s. 67, that no *formal conclusion* (that is, no conclusion in any particular form of words) shall be necessary to any plea, avowry, cognizance, or subsequent pleading.

(*h*) Roscoe on Real Actions, 642.

(*i*) Vide sup. p. 677.

plaintiff, damages for the unlawful taking and detaining; when given for the defendant, either a return of the goods, or, if the distress was for rent, then, at the option of the defendant, a recovery of the amount of rent in arrear. For by statute 17 Car. II. c. 7, if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record, in nature of an avowry or cognizance, or if judgment be given against him on demurrer, then without any such suggestion the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent, or if more, then so much as shall be equal to such arrear, with costs. Or if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant; and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses.

Where the defendant has judgment for a return of the goods, there issues in his favour [a writ *de retorno habendo*, whereby the goods are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made.] And when this judgment is by the default or nonsuit of the plaintiff, [the plaintiff might, at the common law, have brought another replevin, and so *in infinitum*, to the intolerable vexation of the defendant; whereupon the Statute of Westminster the second (c. 2), restrains the plaintiff, when nonsuited, from suing out any fresh replevin, but allows him a *judicial* writ issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him on giving the like security as before. And if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable;* after which no writ of second deliverance shall be allowed (*j*).] On the other hand, [if

(*j*) 2 Inst. 340.

[pending a replevin for a former distress, a man distrains again for the same rent or service, then the party distrained upon is not driven to his action of replevin, but shall have a writ of *recaption* (k); and recover damages for the defendant's, the re-distrainor's, contempt of the process of the law.] In replevin, as in other actions personal, costs are recoverable (l); and by statute 11 Geo. II. c. 19, if the replevin be founded on a distress for rent, quit rents, relief, heriot, or other service (m), and the plaintiff shall become nonsuit, discontinue, or have judgment against him, the defendant shall recover *double* costs of suit. But by a recent provision of 5 & 6 Vict. c. 96, s. 2, double costs in this case (as in all others where they are given by any public act of parliament) are now reduced to "such "full and reasonable indemnity as to all expenses in- "curred, as shall be taxed by the proper officer in that "behalf."

IV. We now arrive at *Ejectment* (n), the fourth and last, but by far the most important, of the anomalous actions of which we proposed in this chapter to treat, being indeed (with the exception of dower) the only action in which land is now capable of being specifically recovered. Some explanation has been already given of the manner of its introduction into our judicial system, and reference has been made to the manner in which it has been recently remodelled (o). But in matters of law, no reform, however valuable in other respects, can enable us to repose in entire ignorance of the institutions which it displaces; and some acquaintance with them will still be necessary to our correct apprehension of those Records and Reports from which the principles of the law in general, are best to be collected.

(k) F. N. B. 71.

(l) Statute of Gloucester, 6 Edw. 1, c. 1, s. 2; 7 Hen. 8, c. 4; 21 Hen. 8, c. 19, s. 3; 17 Car. 2, c. 7, s. 2.

(m) This statute applies to a rent-charge, as well as rent service. Jamieson v. Trevelyan, 10 Exch. 748.

(n) Vide sup. pp. 448, 481, 485, 486.

(o) Vide sup. p. 484.

Before we proceed, therefore, to any explanation of the present form of an ejectment, it will be proper to advert to that which it wore prior to the late improvements. The action at this time, began as follows:—The claimant served the tenant in possession of the land, with a declaration in ejectment, no previous process being issued. It was drawn up in the form properly belonging to a declaration in trespass *quare clausum fregit;* and was entitled as of the court in which the action was intended to be brought, and (in point of date) as of the last preceding term, the service of it being usually in vacation. It was a mere string of fictions, complaining at the suit of a fictitious plaintiff (*p*), for example, John Doe, against a fictitious defendant, for example, Richard Roe, that a lease for a term of years having been made to Doe, by the claimant, and Doe having entered thereupon—the defendant, Roe, ousted him;—for which Doe claimed damages; and subjoined to this declaration was a *notice to appear*, addressed to the tenant in possession, by name, in the form of a letter from Roe, informing him that he, Roe, was sued as a *casual ejector* only, and had no title to the premises, and would make no defence; and therefore advising him to appear in court, in the next Term, and defend his own title; otherwise he, Roe, would suffer judgment to be had against him, and thereby the party addressed would be turned out of possession.

On receipt of this friendly caution, if the tenant in possession did not in due time take the proper steps to be admitted defendant in the stead of Roe, he was supposed to have no right at all: and upon judgment being had against Roe, the casual ejector, the real tenant would be turned out of possession by the sheriff.

In the next Term, however, after the service of the declaration, he had the opportunity of procuring himself to

(*p*) In Blackstone's time it was held that the person stated in the declaration as plaintiff, must be a real person; (3 Bl. Com. p. 203;) but at a later period of the practice, he was always a nominal one.

be made defendant; for in the course of that Term, the real claimant, now called the *lessor of the plaintiff*, moved the court in the name of Doe, the fictitious plaintiff, for a rule for *judgment against the casual ejector*; upon which motion, supported by an affidavit of the due service of the declaration, the court made a rule as of course for such judgment, unless the tenant should appear and plead to issue, within the time therein mentioned; and within that time the tenant in possession signed (by his attorney), what was called a *consent rule*, binding him to confess upon the trial of the cause, that he was at the time of the declaration in possession of the premises therein mentioned, or part of them, and also to confess the *lease* made by the lessor of the plaintiff, as alleged in the declaration, the *entry* of the plaintiff as therein also stated, and lastly, the *ouster* by himself the tenant in possession; and upon such consent rule being signed, the tenant in possession was allowed by the court to enter an appearance in his own name, and to plead the general issue, *not guilty*. After this, the issue was made up and sent down to trial, as in an action at the suit of Doe, plaintiff, on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession): and it is manifest, that, under these circumstances, the matter to be tried, or real and substantial question in the cause, would turn merely upon a fourth point, viz. whether the lessor of the plaintiff had a good *title* to demise, on the day of the supposed demise stated in the declaration. The lessor of the plaintiff was bound to make out a clear title; otherwise his fictitious lessee could not obtain judgment to have possession of the land, for the term supposed to be granted. But if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession was to go for John Doe, the nominal plaintiff; who by this trial had proved the right of A. B. his supposed lessor.

It might happen, however, that the new defendant, after entering into the consent rule, failed to appear at the trial, and to confess lease, entry and ouster. In that case the

plaintiff Doe was of necessity nonsuited, for want of proving those requisites; but judgment would in the end be entered against the casual ejector Roe; and the sheriff, under a writ of execution on such judgment, would have turned out the tenant, and delivered the possession to the plaintiff; for the condition, on which the tenant in possession was admitted a defendant, was broken, and therefore the plaintiff was put again in the same situation as if no such defendant had been admitted at all; the consequence of which, we have seen, would have been that judgment would have been entered for the plaintiff against the casual ejector.

Such was the form of an ejectment, at the time of passing the Common Law Procedure Act, 1852 (*r*). Its form, as now remodelled by that Act, will appear from the following outline.

A writ is issued out of any of the superior courts of the common law, in a prescribed form (*s*), directed to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described—setting forth that some person or persons, by name, claim to be entitled to the possession, and to eject all other persons—and commanding those to whom it is directed, or such of them as deny the alleged

(*r*) It was by a gradual advance that the strange fictions above described obtained reception. Originally the claimant used to make a formal entry, in fact, upon the premises, and there sealed and delivered a lease to some other person, till a third, by a previous agreement or otherwise, entered upon him and turned him out. An action was thereupon brought against the person last mentioned, or *casual ejector*, as he was called; of which, however, the practice required that notice should be given to the tenant in possession. But, as much trouble, says Blackstone (vol. iii. p. 202), attended this actual making of the lease, entry and ouster, a new and more easy method, when there was any actual occupier of the premises, was invented by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench. This was the method just described in the text.

(*s*) This form will be found in the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, Sched. (A.), No. 13.

title, to appear in the court out of which the writ issued, within sixteen days after the service thereof, to defend the possession of the property, or such part of it as they shall think fit. It moreover contains a notice, that, in default of appearance, they will be turned out of possession; and is endorsed with the name and abode of the attorney by whom it is issued, or if there be none, the name and residence of the party, in like manner as a writ of summons in an ordinary action (*t*).

This writ, (which remains in force for three months,) is served by delivering it to the tenant in possession, personally, whether on the premises or elsewhere, or by delivering it personally, on the premises, to some member of his family or household; and in either case it should be read over or its purport explained (*u*). But the manner of service may be varied, under special circumstances, by order of the court or a judge. And in the case of a vacant possession, the service is effected by posting a copy of the writ upon the door of the dwelling house, or other conspicuous part of the property (*x*).

Not only the person to whom the writ is directed by name, but any other person also, (on filing an affidavit showing that he or his tenant is in possession, and obtaining the leave of the court or a judge,) may be allowed to appear and defend (*y*). Supposing no appearance to be entered, the claimant (or plaintiff), (for to simplify the matter we will suppose a single party on either side,) is at liberty to sign judgment for recovery of the possession (*z*); but on the

(*t*) 15 & 16 Vict. c. 76, ss. 168, 169.

(*u*) 15 & 16 Vict. c. 76, s. 170. By this section the writ is to be served in the same manner as a declaration in ejectment was theretofore served. This manner is described in the text. In Edwards *v.* Griffith, 15 C. B. 397, it was however considered doubtful if it was now necessary to read over or explain the writ to the party served.

(*x*) 15 & 16 Vict. c. 76, s. 170.

(*y*) Ibid. s. 172. See Reg. Gen. Hil. T. 1853, (Pr.) rr. 112, 113.

(*z*) 15 & 16 Vict. c. 76, s. 177, Reg. Gen. above cited, r. 112. The form of the judgment will be found in 15 & 16 Vict. c. 76, sched. (A.), No. 15.

opposite supposition, viz. that of an appearance, an issue is at once made up without any pleadings (a), by the plaintiff or his attorney, setting forth the writ and the appearance of such a person named, and his defending for the premises, (or for a certain part of them, as the case may be (b)); and upon the issue so made up, the parties may proceed to trial, (after a ten days' notice,) according to the same course of practice as in other actions (c); and the question to be tried will be, whether the statement in the writ, of the title of the claimant, be true or false (d). But in the particular case, where the defendant claims to be joint-tenant, in common, or co-parcener with the plaintiff, whose title he so far admits, but denies having ousted him, a notice must be duly given by the defendant to that effect; and such notice must be entered, (among the other proceedings,) in the issue made up; and the question will then be two-fold—first, whether the defendant has in truth any such title as joint-tenant, or the like; and secondly, whether an actual ouster of the plaintiff has taken place (e).

If, at the trial (f), the jury find for the plaintiff, that is, find, (in the ordinary case), that the statement in the writ of his being entitled to the possession, is true, or (in the case last supposed), that either the defendant is not such

(a) The term "issue" is here employed in its secondary sense of a transcript of the proceedings, as sup. p. 589. For as there is no pleading there can be no issue in the proper sense, as defined, sup. p. 571. Nor, for the same reason, can there be any *equitable* defence under the Common Law Procedure Act, 1854, (as to which, vide sup. p. 573, n. (y)). Neave v. Avery, 16 C. B. 328.

(b) The form will be found in 15 & 16 Vict. c. 76, Sched. (A.), No. 16.

(c) 15 & 16 Vict. c. 76, s. 180. It may be remarked here that the statement in the text supposes that no *special case* has been stated by consent, so as to take the opinion of the court upon the facts, without proceeding to trial. But this may be done in ejectment, as in other actions. (Ibid. s. 179.) As to this course of proceeding in other actions, vide sup. p. 637.

(d) 15 & 16 Vict. c. 76, s. 180.

(e) Ibid. s. 189.

(f) Supposing the defendant not to appear at the trial, the plaintiff will have a verdict without producing evidence. Reg. Gen. Hil. T. 1853, (Pr.) r. 114.

joint-tenant, or the like, or that though he is so, yet an actual ouster of the plaintiff has taken place, judgment may be signed by the plaintiff, for the recovery of the premises, (or part of them, as the case may be,) with costs, —and execution issued accordingly;—under which possession will be delivered to him by the sheriff (*g*). But if the jury find for the defendant, that is, find, (in the ordinary case,) that the statement in the writ, that the plaintiff is entitled to the possession, is false, or, (in the other,) that the defendant was entitled as joint-tenant or the like, and that there has been no actual ouster of the plaintiff, then the defendant will be entitled to sign judgment for his costs, and take out execution accordingly (*h*).

Upon the judgment, after a special verdict, or a bill of exceptions, or, (by consent,) after a special case, error may be brought in the same manner as in other actions; but, (except in the case of such consent as aforesaid,) execution will not be thereby stayed, unless the plaintiff in error, (when defendant in the suit,) shall give bond to his adversary, for payment of such costs and damages as shall be awarded after affirmance; including such compensation for *mesne* (or intervening) profits taken, or waste committed, since the judgment, as may be assessed under a writ of inquiry to be issued for the purpose (*i*).

To this sketch of the general course of the new proceeding in an ejectment in ordinary cases, we have only to add, that, in order to complete the remedy, recourse must,

(*g*) 15 & 16 Vict. c. 76, ss. 185, 189. For the form in which the verdict is entered, see ibid. Sched. (A.), No. 17, and for the form of the writ of execution, (which is called an *habere facias*,) Reg. Gen. Hil. T. 1853 (Pr.), Sched. No. 23. Judgment may be signed and execution issued within such time, not exceeding the fifth day in Term, after the verdict, as the court or the judge before whom the cause was tried shall order; or, if no order be made, then on the fifth day in Term after the verdict, or in fourteen days after the verdict, whichever first shall happen, 15 & 16 Vict. c. 76, s. 185.

(*h*) Ibid. s. 186. The defendant will be entitled to do this, within the same period after the verdict, as mentioned in the last note.

(*i*) 15 & 16 Vict. c. 76, s. 208.

in general, be had, (according to the practice that has always been pursued,) to another and supplementary action (*j*), viz., an ordinary action of trespass *quare clausum fregit*, to recover the mesne profits which the defendant has received during the period of his wrongful possession. In this case, the judgment in the ejectment is conclusive evidence of the plaintiff's right to all profits accruing since the period from which that judgment itself shows him to have been entitled (*j*); and also conclusive as to the receipt of such profits by the defendant: but as to profits claimed in respect of any antecedent period, the defendant is at liberty to contest both the plaintiff's title, and his own receipt of them.

It still remains, however, to take notice of certain legislative provisions in favour of *landlords*, without which our general view of the proceedings in and connected with the action of ejectment, is not complete (*k*).

And first, to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, all tenants are obliged, on pain of forfeiting three years' rent, to give notice to their landlords of any writ in ejectment delivered to them, or coming to their knowledge (*l*): and any landlord, (a term which has been held to extend to the heir, remainderman, mortgagee, devisee in trust, and the like,) may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appears to it,—or if he make default, may, by such leave, become sole defendant (*m*).

(*j*) As between *landlord and tenant*, however, mesne profits may be recovered in the ejectment itself. Vide post, p. 692.

(*j*) See Wilkinson *v.* Kirby, 15 C. B. 430.

(*k*) See also provisions enabling landlords to recover possession in more summary methods than ejectment, in particular cases where their tenants *desert* the premises, leaving rent in arrear, or *hold over*, 11 Geo. 2, c. 19; 57 Geo. 3, c. 52; 1 & 2 Vict. c. 74; 19 & 20 Vict. c. 108, s. 50; sup. vol. I. p. 295.

(*l*) 15 & 16 Vict. c. 76, s. 209, being a re-enactment of 11 Geo. 2, c. 19.

(*m*) Blackstone says (vol. iii. p. 204), that long before the statute 11 Geo. 2, c. 19, the landlord had a similar right; and he also refers

Secondly. It is the rule of the common law, that though there be a proviso for re-entry by the landlord, in the case of rent remaining in arrear, yet he cannot have the benefit of that proviso, (unless it be accompanied by an express stipulation to that effect,) without making a formal demand upon the premises out of which the rent issues; which demand must also be of the precise sum claimed, and made at the precise time when it became due (*n*); but to obviate these niceties it is provided, in all cases between landlord and tenant, that if half-a-year's rent be in arrear (*o*), and there be a right to re-enter and determine the lease, for the non-payment (*p*), and no sufficient distress be found (*q*), the landlord may serve a writ in ejectment for recovery of the premises, or in case the same cannot be legally served, or no tenant be in actual possession, may affix a copy of the writ upon the door, or if there be no messuage, then upon some notorious part of the premises; which shall stand in the place of a formal demand and re-entry; and a recovery and execution in such ejectment shall be final and conclusive both in law and equity, unless the rent and full costs be paid or tendered within six calendar months afterwards (*r*).

Thirdly. It is enacted, that when the interest of any tenant holding under lease or agreement in writing, for term of years certain, or from year to year, shall have expired or been determined by regular notice to quit, and, after lawful demand in writing served personally, or left at the tenant's usual place of abode, possession shall have been

to the antient rule of law by which, if the tenant in a real action made default, the remainderman or reversioner had a right to come in and defend the possession. It is to be observed, that where the landlord defends, it must be stated in his appearance that he appears *as landlord*. 15 & 16 Vict. c. 76, s. 73.

(*n*) See Duppa *v.* Mayo, 1 Saund. Wms. 287.

(*o*) See Gretton, *v.* Roe 4 C. B. 576.

(*p*) Doe *v.* Bowditch, 8 Q. B. 973.

(*q*) Doe *v.* Wandlass, 7 T. R. 117.

(*r*) 15 & 16 Vict. c. 76, s. 210, being a re-enactment, in substance, of 4 Geo. 2, c. 28. The reader will recollect that by 19 & 20 Vict. c. 108, s. 52, there is a remedy in the same cases in the *County Courts*, where the rent or value does not exceed 50*l*. Vide sup. p. 382, n. (*a*).

refused, the landlord, at the foot of his writ in ejectment brought to recover the premises, may address a notice to the tenant, requiring him to find bail; and on the appearance of the tenant, and by order of the court or a judge, after hearing both parties, the tenant may be required to enter into a recognizance, with two sufficient sureties, to pay the costs and damages which shall be recovered by the plaintiff; and on his failure to do this, the plaintiff shall be entitled to sign judgment for recovery of the possession, with costs (*s*).

Fourthly. It is provided, that whenever it shall appear in *any* ejectment between landlord and tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom the cause is tried, whether the defendant shall appear on the trial or not, shall permit the plaintiff, after proof of his right, to go into evidence of the *mesne* profits thereof which have accrued from the time when the defendant's interest determined, down to the time of the trial; and the jury, finding for the plaintiff, shall give their verdict on the whole matter, both as to recovery of possession and *mesne* profits (*t*).

Lastly. There is a provision, that in all ejectments in the courts at Westminster, by a landlord against a tenant, or against any person claiming under the tenant, for the recovery of lands or hereditaments, (in any county except London or Middlesex,) where the tenancy shall expire, or the right of entry accrue, in or after Hilary or Trinity Term, it shall be lawful for the claimant at any time within ten days after the tenancy expires, or the right of entry accrues, to serve a writ in ejectment, commanding the person or persons to whom it is directed, to appear

(*s*) 15 & 16 Vict. c. 76, s. 213, being a re-enactment, in substance, of 1 Geo. 4, c. 87. As to this recognizance, see Doe *v.* Sharpley, 15 Mee. & W. 558; Doe *v.* Roe, 2 L. M. & P. 322; Doe *v.* Roe, 6 C. B. 272.

(*t*) 15 & 16 Vict. c. 76, s. 214, being a re-enactment, in substance, of 1 Geo. 4, c. 87. See Smith *v.* Tett, 9 Exch. 307.

within *ten* days after service thereof; and proceedings shall be had as in other cases, save that it shall be sufficient to give *six* clear days' notice of trial instead of *ten* days, which is the notice required in other cases; the defendant, however, being at liberty to apply to a judge to *stay or set aside* the proceedings, or to postpone the trial (*u*).

(*u*) 15 & 16 Vict. c. 76, s. 217, being a re-enactment, in substance, of 11 Geo. 4 & 1 Will. 4, c. 70, s. 36.

CHAPTER XII.

OF PREROGATIVE WRITS AND OTHER EXTRAORDINARY REMEDIES IN THE COURTS OF COMMON LAW.

We have now taken a view of the method of proceeding in all actions, whether regular or irregular, (if those terms may be used,) which are known in the modern practice.

The common law however affords, in certain cases of civil injury, other remedies, of a nature generically different from an action, and to these we propose to devote the following chapter. But as the proceedings in them are generally introduced by that kind of application to the court, which is technically called a *motion*, it will be proper to premise some explanation as to the nature of a motion in general. And here we shall confine ourselves to applications to the court in *banc*, to which alone the name of motions is properly applied; not deeming it necessary to take any particular notice of such applications as are made to a *single judge at chambers*, a branch of practice more summary in its nature than the former, and turning for the most part on matters of subordinate importance (*a*).

A motion, then, is an application made to the judges, *vivâ voce*, in open court, and it may be either incidental to

(*a*) As to proceedings before a single judge, see Bagley's Chamber Practice; Lush's Pr. pp. 668—678, 2nd edit. Et vide 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 2. The importance of the practice at chambers has been now increased by the Common Law Procedure Acts; particularly by the provision of 15 & 16 Vict. c. 76, s. 52, authorizing the sufficiency of pleadings, in certain cases, to be decided upon by a judge at chambers.

an action,—a relation in which we have already had occasion sometimes to refer to it,—or it may be wholly unconnected with that kind of remedy. In the superior courts, it can be made by none but a counsel or barrister, to the exclusion of attornies; and the practice of every court requires that it should, in general, be supported by *affidavit* (*b*) of the matter of fact on which it is founded. Its object, in a general point of view, is to obtain an order, (called, in the superior courts of common law, a rule (*c*),) directing some act to be done in favour of the applicant; which rule, when obtained, is served (*d*) upon the party by whom the act is to be performed. The rule so moved for, is in its form usually a rule to *show cause*, (otherwise called a rule *nisi*,) commanding the party, on a certain day therein named, to show cause to the court, why he should not perform the act, or submit to the terms therein

(*b*) *Affidavits* are made on various occasions in the course of judicial proceedings, and are sworn before the court, or some officer appointed to take affidavits in such court. It may be remarked here, that a practice formerly obtained of making *voluntary* affidavits, i. e. affidavits sworn before magistrates or others, in matters on which no judicial inquiry was pending; but by 5 & 6 Will. 4, c. 62, this practice is now prohibited, and a form of *declaration* substituted for such voluntary affidavits. And it is provided, that any person making a false declaration shall be guilty of a misdemeanor. This declaration is also substituted for the affidavits that used formerly to be taken to verify documents, &c., in the different departments of the state. It is further to be remarked, that the provision formerly noticed of 17 & 18 Vict. c. 125, s. 20, by which persons unwilling from alleged conscientious motives to be sworn on oral examination as witnesses, are permitted to make *affirmation* in lieu of oath, applies also to persons called upon to make affidavit or deposition. See also sect. 45 of the same statute as to the affidavits allowed in answer to affidavits in support of motions; sect. 48, as to the examination, before a judge or master, of persons refusing to make affidavit when required to do so by any party to any civil proceeding in the Superior Courts; and 6 Geo. 4, c. 87; 15 & 16 Vict. c. 76, s. 23; 18 & 19 Vict. c. 42, as to the admission, in the courts here, of affidavits duly administered abroad.

(*c*) By Reg. Gen. H. T. 1853, (Pr.) r. 149, every rule of court must be dated the day of the week, month and year on which the same is drawn up, without reference to any other time or date.

(*d*) As to the time and manner of service of rules, see Reg. Gen. H. T. 1853, (Pr.) rr. 162—167; E. T. 1856.

set forth; but in some cases, where the right to the relief prayed for is very clear, it is a rule *absolute in the first instance*, commanding the thing to be done, without the appointment of any day to show cause. Upon the day appointed by the rule *nisi*, the counsel for the party on whom it was served, accordingly appears, and is heard in opposition to it; and the counsel by whom it was moved having been afterwards heard in reply, the court either discharges the rule, or makes it absolute, as the case may be; and that upon the terms either that the costs of the application be paid by one of the parties to the other, or without costs, as may appear most equitable under the circumstances of the case. But if the party served with the rule, fail to appear in opposition to it, it is made absolute as a matter of course. Upon its being made absolute or discharged, (as the case may be,) a new rule to that effect is then served by the successful on the unsuccessful party, who is bound to obey it upon peril of a writ of attachment as for a contempt (*e*),—a writ issued by the court in vindication of its own authority, and under which the party is liable to coercion by the arrest of his person.

We shall now resume the main subject of the chapter, by the consideration of such of the remedies afforded at common law, as are distinct, in their nature, from an action. These chiefly consist of what are called *prerogative writs*; [which do not issue as of mere course, without showing some probable cause why the extraordinary powers of the Crown are called into the party's assistance (*f*),] and are principally as follows:

I. The writ of *Procedendo*. This [issues out of the Court of Chancery, when judges of any subordinate court

(*e*) Vide sup. p. 356.

(*f*) 3 Bl. Com. 132. In R. *v.* Cowle, Burr. 855, prerogative writs are also distinguished from writs ministerially directed, viz. those issued to the sheriff; the prerogative writs being generally directed to no sheriff or minister of the court; but to the public or private parties, whose acts are the subject of complaint.

[do delay the parties, for that they will not give judgment, either on the one side or the other, when they ought so to do (*g*).] In such case a writ of *procedendo ad judicium* [shall be awarded, commanding the inferior court, in the name of the Crown, to proceed to judgment, but without specifying any particular judgment; for that, if erroneous, may be set aside by proceedings in error, or by writ of false judgment; and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment,] returnable in the Courts at Westminster. A *procedendo* may also be awarded out of any of the superior courts, where an action has been removed to it from an inferior court by *habeas corpus* or *certiorari* to be hereafter mentioned, and it appears to the superior court that it was removed on insufficient grounds (*h*). And by 21 Jac. I. c. 23, a suit once so remanded, shall never afterwards be removed, before judgment, into any court whatsoever.

II. The writ of *Mandamus*. In treating of which we shall refer mainly, and in the first instance, to the common law or *prerogative* writ of *mandamus*, though we shall add a few words as to another species recently introduced by the statute 17 & 18 Vict. c. 125, and which may be described as the *mandamus* incidental to an action (*i*).

1. Taking the term of *mandamus* in its first sense,—the power of issuing this writ, belongs exclusively to the Court of Queen's Bench. [It is a high prerogative writ, of a most extensive remedial nature,] and is in its form a command issuing in the Queen's name, from the Court

(*g*) F. N. B. 153, 240; Blanchard *v.* De la Crouée, 16 L. J. (Q. B.) 181.

(*h*) 21 Jac. 1, c. 23; Jac. Dict. *Procedendo;* Reg. Gen. 1853, (Pr.) r. 116.

(*i*) Even prior to this Act a *mandamus*, auxiliary to an action, was introduced, viz. the *mandamus* to examine witnesses in India and other British dominions in foreign parts. See 13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 1. The *mandamus*, in such cases, may be awarded by any of the superior courts at Westminster.

of Queen's Bench, and [directed to any person, corporation, or inferior court of judicature, within the Crown's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice.] In its application it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*k*), and where no effectual relief can be obtained in the ordinary course of an action at law (*l*). Such is the general principle; but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail (*m*). We may remark, however, that (among other cases) this writ lies to compel the admission or restoration of the applicant [to any office or franchise of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting house, or the like;] and that it will be also granted [for the production, inspection, or delivery, of public books and papers, or for the surrendering of the regalia of a corporation, or to oblige bodies corporate to affix their common seal, or to compel the holding of a court,] or the proceeding to an election in corporate and other public offices (*n*). In addition to which, we may notice, as another important application of this writ, [that it issues to the judges of any inferior

(*k*) R. *v.* Bank of England, 2 B. & Ald. 622.

(*l*) See R. *v.* Bishop of Chester, 1 T. R. 396; R. *v.* Archbishop of Canterbury, 8 East, 219; Ex parte Robins, 1 W. W. & H. 578; R. *v.* Nottingham Old Water Works Company, 6 A. & El. 355; R. *v.* Bristol Dock Company, 2 Q. B. 69; The Queen *v.* Lancashire and Yorkshire Railway Company, 1 Ell. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment*. R. *v.* Severn Railway Company, 2 B. & Ald. 646.

(*m*) A copious enumeration of them will be found in 1 Chit. Gen. Pr. of Law, 789; see also Tapping on *Mandamus*.

(*n*) 11 Geo. 1, c. 4; and 7 Will. 4 & 1 Vict. c. 78, s. 24; R. *v.* Mayor, &c. of London, 1 T. R. 146; R. *v.* Leyland, 3 M. & S. 184; R. *v.* Norwich, 1 B. & Adol. 310.

[court (o), commanding them to do justice according to the power of their office, whenever the same is delayed. For it is the peculiar business of the Court of Queen's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.

This writ is granted on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below (p),—whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made,] (except under particular circumstances, where a rule will be granted absolute in the first instance (q),) [directing the party complained of to show cause why a writ of *mandamus* should not issue; and if he shows no sufficient cause,] and does not submit without contest to the application, [the writ itself is issued at first in the alternative, either to do this, or signify some reason to the contrary; to which a *return* or answer must be made at a certain day.]

(o) It is provided, however, by 19 & 20 Vict. c. 108, s. 43, as to the County Courts, that no *mandamus* shall henceforth issue to a judge or officer of such court for refusing to do any act relating to the duties of his office; but application must be made to a superior court or a judge for a rule or summons to show cause why such act should not be done. See also as to such refusal by justices of the peace or stipendiary magistrate, 11 & 12 Vict. c. 44, s. 5; R. v. Ingham, 17 Q. B. 884; R. v. Paynter, 28 L. T. (Q. B.) 303; R. v. Dayman, 29 L. T. (Q. B.) 125.

(p) Unless there has been a distinct refusal to do that which it is the object of the *mandamus* to enforce, the writ will not be granted. R. v. Brecknock, &c. Company, 3 A. & E. 217.

(q) See R. v. Archdeacon of Lichfield, 5 Nev. & M. 42; Ex parte Penruddock, 1 Har. & W. 347; R. v. Fox, 2 Q. B. 246; R. v. Churchwardens of Manchester, 7 Dowl. 707. Et vide 6 & 7 Vict. c. 89, s. 5; 17 & 18 Vict. c. 125, s. 76, as to the notice to be given, in cases affecting corporate offices, to the opposite party of the application, and as to making the rule absolute in the first instance, if the court think fit; and as to the time at which the writ may be made returnable.

[If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment.] If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues, in the second place, a *peremptory mandamus* to do the thing absolutely, [to which no other return will be admitted (*r*) but a certificate of perfect obedience, and due execution of the writ.] The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion; but as to the truth of its allegations *in point of fact*, it was a rule that this could not be investigated by any further proceeding on the *mandamus*;—the complaining party having no remedy in case the facts were untruly alleged, but to bring an action on the case for a false return; in which, if he obtained a verdict, he recovered [damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant.] But by 9 Ann. c. 20, in a *mandamus* for determining the right to a corporate office, and now by 1 Will. IV. c. 21, in *all* cases of *mandamus*, [the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return, and after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution;—which latter, in case of an action, is effected by a writ of restitution (*s*).] So that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because by the same acts it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall in all cases, upon judgment after issue joined, or by default, be entitled to his costs (*t*).* In addition to which, it has been

(*r*) R. *v.* Ledgard, 1 Q. B. 616.

(*s*) 11 Rep. 79.

(*t*) As to the course of proceeding on *mandamus*, see R. *v.* Oundle, 1 A. & E. 283; R. *v.* Governors of Darlington School, 6 Q. B. 682; Ex parte Thompson, ibid. 721; Clarke *v.* Leicestershire and Northampton-

enacted by 6 & 7 Vict. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in personal actions; and thereupon the writ return and demurrer shall be entered on record, and the court shall adjudge either that the return is valid in law, or that it is not valid in law, or that the writ of *mandamus* itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, shall award a peremptory *mandamus;* and shall also, in any event, award costs to be paid to the successful party. The same statute also provides, that either party shall be at liberty in every case where judgment is given against him upon a *mandamus*, whether after demurrer or otherwise, to take proceedings in error thereon, according to the ordinary course of error in personal actions (*u*).

Besides these provisions with respect to *mandamus*, we may notice the enactment of 1 & 2 Will. IV. c. 58, s. 8, intended to afford relief to officers and other persons to whom such writ is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest. It is provided in favour of such persons, that it shall be lawful for the court to which application is made for the writ of *mandamus*, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter of such writ, to appear and show cause against the issuing of the same, and thereupon to make such rules and orders between all parties as the circumstances of the case may require.

shire Canal Company, ibid. 898; The Queen *v.* Ambergate Railway Company, 17 Q. B. 957. By 1 Will. 4, c. 21, s. 8, the costs of the application for a *mandamus*, whether granted or refused, and the costs of the writ, where issued and obeyed, are in the discretion of the court. See R. *v.* Oundle, ubi sup.; R. *v.* Eastern Counties Railway Company, 2 Q. B. 578; R. *v.* St. Pancras, 2 Dowl. N. S. 955; The Queen *v.* Ingham, 17 Q. B. 884.

(*u*) It is also provided by 17 & 18 Vict. c. 125, s. 77, that the provisions both of that Act, and of the 15 & 16 Vict. c. 76, so far as they are applicable, shall apply to the proceedings and pleadings upon a prerogative writ of *mandamus* issued by the Court of Queen's Bench.

2. As to the *mandamus* which we have described, as *incidental to an action*, it is provided by 17 & 18 Vict. c. 125, s. 68—76, that the plaintiff in any action, (except replevin and ejectment,) in any of the superior courts, may indorse upon the writ of summons and the copy to be served, a notice that the plaintiff intends to claim a writ of *mandamus* commanding the defendant to perform some duty in which the plaintiff is interested; and the plaintiff may accordingly make such claim afterwards in his declaration (either together with any other demand capable of being enforced in such action, or separately), setting forth therein the grounds of such claim, and that though performance of the duty has been demanded, it has been neglected or refused. If judgment is given in such action, that a *mandamus* do issue, a peremptory writ of *mandamus*, (besides the ordinary execution proper to the action,) is to issue accordingly, commanding the defendant forthwith to perform the duty; and in case of disobedience, it may be enforced by attachment; or the court may, on application of the plaintiff, direct that the act shall be done by the plaintiff, or by some person of the court's appointment, at the expense of the defendant. It has been decided, however, upon the construction of these provisions, that the duty, for nonperformance of which the writ is claimed, can be no other than such as might be enforced by a prerogative writ of *mandamus* (*y*).

III. The writ of *Prohibition* (*z*). [A prohibition is a writ issuing properly only out of the Court of Queen's Bench (*a*); but for the furtherance of justice, it may now also be had in some cases out of the Court of Chancery,

(*y*) Benson *v.* Paull, 6 Ell. & Bl. 373.

(*z*) As to prohibition, see the following modern cases:—Ex parte Tucker, in re Inman, 1 M. & Gr. 519; Tucker *v.* Tucker, 4 Man. & Gr. 1074; Hassach *v.* Cambridge University, 1 Q. B. 593; Re Dean of York, 7 Q. B. 1; Evans *v.* Gwynn, 5 Q. B. 844; Francis *v.* Steward, ibid. 984; De Haber *v.* Queen of Portugal, 21 L. J. (Q. B.) 488.

(*a*) Company of Horners, 2 Roll. Rep. 471.

[Common Pleas, or Exchequer (*b*); directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a surmise either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law, as to the courts of the counties palatine, if they hold plea of land or other matters not lying within their respective franchises (*c*); or to the county courts (*d*) or courts baron, where they attempt to hold plea] of any matter of a value beyond what can be sued for therein;—or [to the courts christian, the university courts, the court of chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction, as if the first should attempt to try the validity of a custom pleaded (*e*), or the last a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England (*f*);] as where a spiritual court

(*b*) Hutton's case, Hob. 27; 1 P. W'ms. 476; Palmer, 523. See Ex parte Smyth, 1 Tyr. & G. 225; and Ex parte Tucker, in re Inman, 1 Man. & G. 529; Tucker *v.* Tucker, 4 Man. & G. 1074.

(*c*) Vaughan *v.* Evans, Ld. Raym. 1408.

(*d*) Blackstone is here referring to the County Courts at Common law. As to the writ of prohibition in reference to the new County Courts, see 13 & 14 Vict. c. 61, s. 22; 19 & 20 Vict. c. 108, ss. 40—42, 44; Toft *v.* Rayner, 5 C. B. 162; Ellis *v.* Watt, 8 C. B. 614; Fearon *v.* Norvall, 5 D. & L. 439; Jones *v.* Jones, ibid. 628; Zohrab *v.* Smith, ibid. 635; Edwards *v.* Rogers, 1 L. M. & P. 196; Still *v.* Booth, ibid. 440; Marsden *v.* Wardle, 3 Ell. & Bl. 695; Jackson *v.* Beaumont, 11 Exch. 300.

(*e*) Vanacre *v.* Spleen, Carth. 33. The spiritual courts have power to construe a *statute*, the effect of which incidentally comes before them in the course of a proceeding where they have jurisdiction. Hall *v.* Maule, 7 Ad. & El. 721.

(*f*) If sentence has been given in the court below, the court in which application is made for a prohibition will presume that there was no excess of jurisdiction, unless such excess be distinctly proved, or be apparent on the face of the proceedings. Vanacre *v.* Spleen, ubi sup.; Hart *v.* Marsh, 5 Ad. & Ell. 591.

requires two witnesses to prove a release or payment of tithes (g), or the like; in such cases also a prohibition will be awarded (h). [For as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts, because incident or accessary to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition (i).

A short summary of the method of proceeding in prohibition, is as follows. The party aggrieved in the court below applies to the superior court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom;] and this used formerly to be done by filing, as of record, a *suggestion*, containing a formal statement of the facts; but now by 1 Will. IV. c. 21, it is provided, that it shall not be necessary to file

(g) Mallary v. Marriott, Cro. Eliz. 667; Hob. 188.

(h) A prohibition will not be awarded in reference to a mere point of *practice* where the court has jurisdiction on the general subject of the cause. Ex parte Smyth, 1 Tyr. & G. 227; Jolly v. Baines, 12 Ad. & El. 201; Ex parte Story, 12 C. B. 767.

(i) Blackstone remarks (vol. iii. p. 113), that "so long as the idea "continued among the clergy, that "the ecclesiastical state was wholly "independent of the civil, great "struggles were constantly main-"tained between the temporal courts "and the spiritual, concerning the "writ of prohibition and the proper "objects of it; even from the time "of the constitutions of Clarendon; "made in opposition to the claims "of Archbishop à Becket, in 10 "Hen. 2, to the exhibition of certain "articles of complaint to the king, "by Archbishop Bancroft, in the "third year of James the first, on "behalf of the ecclesiastical courts; "from which, and from the answers "to them signed by all the judges "of Westminster Hall, much may be "collected concerning the reasons of "granting, and methods of proceed-"ing upon, prohibitions." He cites 2 Inst. 601—618.

any suggestion, but that an application for a writ of prohibition may be made by *affidavits* only, that is, in the way of an ordinary motion, by a rule to show cause; upon which, if the matter alleged appear to the court, upon the showing cause, to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. [But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition (*k*);] that is, to deliver a declaration against the other, setting forth, in a concise manner, so much of the proceeding in the court below, as may be necessary to show the ground of the application, and praying that a writ of prohibition may issue (*l*); and this used formerly to be connected with an allegation that the party sued on behalf of the Crown as well as of himself, and with a supposition or fiction (which was not traversable (*m*)), that the defendant had proceeded in the suit below, notwithstanding a writ of prohibition. But by the statute just mentioned, the use of these forms is now expressly abolished; and it is provided, that to this declaration, the party defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judg-

(*k*) A declaration in prohibition will always be directed, on the application of the person against whom the prohibition is sought. (Remington *v.* Dolby, 9 Q. B. 176.) With respect, however, to applications for a writ of prohibition to a *County Court*, it is provided by 19 & 20 Vict. c. 108, s. 42, that the matter shall be finally disposed of by rule or order, and no declaration, or further proceedings in prohibition, allowed.

(*l*) 1 Will. 4, c. 21, s. 1.

(*m*) Barn. Not. 4to. 148.

ment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs. The effect of the legislative provisions here cited, has consequently been to place prohibitions, after a rule to declare has been obtained, upon a footing substantially of an action, and in this respect it exhibits, we see, a close resemblance to a mandamus (*n*). After a writ of prohibition has been issued, if either the judge of the court below, or a party, shall proceed in disobedience to it, [an attachment may be had against them to punish them for the contempt, at the discretion of the court that awarded it, and an action will lie against them to repair the party injured in damages (*o*).]

IV. Another remedy analogous to these, is the writ of *Quo warranto*. [This writ is in the nature of a writ of right for the Crown (*p*), against him who claims or usurps any office (*q*), franchise, or liberty (*r*), to inquire by what authority he supports his claim, in order to determine the right (*s*). It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster (*t*); but afterwards only before the justices in eyre,

(*n*) For the former course of proceeding in prohibition, see Com. Dig. Prohibition (H); Bac. Ab. Prohibition.

(*o*) F. N. B. 40; 2 Inst. 601—618.

(*p*) R. *v.* Shepherd, 4 T. R. 381.

(*q*) Darley *v.* The Queen, 12 Cl. & Finn. 520; R. *v.* Mousley, 16 L. J. (Q. B.) 89. As to offices, vide sup. vol. II. p. 626.

(*r*) R. *v.* Archdall, 8 Ad. & El. 281; and as to franchises and liberties, vide sup. vol. I. p. 662.

(*s*) Finch, L. 322; 2 Inst. 282.

(*t*) Old Nat. Brev. fol. 107, edit. 1534.

[by virtue of the statutes of *quo warranto*, 6 Edw. I. c. 1, and 18 Edw. I. st. 2 (*u*); but since those justices have given place to the king's temporary commissioners of assize (*x*), the judges on the several circuits, this branch of the statutes lost its effect (*y*); and writs of *quo warranto*, (if brought at all,) must now be prosecuted and determined before the king's (or queen's) justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the Crown, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the sovereign's hands, to be granted out again to whomsoever he shall please, or, if it be not such a franchise as may subsist in the hands of the Crown, there is merely judgment of *ouster*, to turn out the party who usurped it (*z*).

The judgment on a writ of *quo warranto*, (being in the nature of a writ of right,) is final and conclusive even against the Crown; which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the Court of Queen's Bench by the attorney-general, in the nature of a writ of *quo warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a *criminal* method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the Crown (*a*); but hath long been applied to

(*u*) 2 Inst. 498; Rast. Entr. 540.

(*x*) Vide sup. p. 414.

(*y*) 2 Inst. 498.

(*z*) R. *v.* Stanton, Cro. Jac. 259; R. *v.* Mayor of London, 1 Show. 280.

(*a*) Blackstone remarks, (vol. iii. pp. 263, 264,) that "during the violent proceedings that took place in "the latter end of the reign of King "Charles the second, it was, among "other things, thought expedient to "new-model most of the corporation "towns in the kingdom; for which "purpose many of those bodies "were persuaded to surrender their "charters; and informations in the "nature of *quo warranto* were "brought against others, upon a "supposed, or frequently a real, "forfeiture of their franchises by "neglect or abuse of them. And the

[the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor (*b*); the fine being nominal only (*c*).] It is therefore considered in modern practice as merely a civil proceeding (*d*).

This proceeding is now applied as [between party and party, without any intervention of the prerogative, by virtue of the statute 9 Anne, c. 20, which permits an information in the nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the *relator* (*e*),) against

" consequence was, that the liberties " of most of them were seized into " the hands of the king, who granted " them fresh charters, with such " alterations as were thought expe- " dient; and, during their state of " anarchy, the Crown named all " their magistrates. This exertion " of power, though perhaps *in summo* " *jure* it was for the most part " strictly legal, gave a great and " just alarm; the new-modelling of " all corporations being a very large " stride towards establishing arbi- " trary power; and therefore it was " thought necessary at the revolu- " tion to bridle this branch of the " prerogative, at least so far as re- " garded the metropolis, by statute " 2 W. & M. c. 8, which enacts, that " the franchises of the city of London " shall never hereafter be seized or " forejudged for any forfeiture or " misdemeanor whatsoever."

(*b*) It is discretionary, however, in the court to grant or withhold a *quo warranto* information in such cases. R. *v.* Parry, 6 Ad. & El. 810.

(*c*) See the difference in the application of *mandamus* and *quo warranto* respectively illustrated in the cases of R. *v.* Oxford, 6 Ad. & El. 349; R. *v.* Winchester, 7 Ad. & El. 215; R. *v.* Phippen, ibid. 970. After an office is determined, an information in *quo warranto* to try the title thereto will not be granted. (Re Harris, 6 Ad. & E. 475.) An information in *quo warranto* does not lie for exercising the office of guardian to a poor law union. (Re Aston Union, ibid. 784.) But it lies in respect to the office of clerk to a board of guardians appointed by statute. Queen *v.* St. Martin's in the Fields, 17 Q. B. 149.

(*d*) 4 Bl. Com. 312. In virtue of its being considered as a civil proceeding, the court will grant a new trial, though the verdict should have been for defendant. R. *v.* Francis, 2 T. R. 484; Attorney-General *v.* Rogers, 11 M. & W. 675. The Common Law Procedure Act, 1852, does not, however, apply to an information in *quo warranto*. Reg. *v.* Seale, 5 Ell. & Bl. 1.

(*e*) By Reg. Gen. M. T. 3 Vict. (vide 11 A. & E. 2) no rule shall hereafter be granted for filing any information in the nature of a *quo warranto*, unless, at the time of moving, an affidavit be produced, by which some person or persons shall depose, that such motion is made

[any person usurping, intruding into, or unlawfully holding any franchise, or office, in any city, borough, or town corporate (*f*);—provides for its speedy determination (*g*),—and directs that if the defendant be convicted, judgment of ouster, (as well as a fine,) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.]. By 32 Geo. III. c. 58, intituled "An Act for the Amendment of the Law upon Information in the nature of *Quo Warranto*," it is also provided that the defendant may plead in bar to any information in *quo warranto* in respect of any office in a town corporate, whether exhibited by leave of the court, or by the attorney-general on behalf of the Crown, that he first took upon himself such office, six years or more before the exhibiting the information; which plea may be pleaded with any other pleas that the court may allow, and may be met by a replication that a forfeiture of such office happened within the period of that limitation; and it is further provided, that the title of the defendant derived under any election shall not be affected on account of defect in the title of the person electing, provided the elector shall have been in the exercise *de facto* of his office, six years previous to the information. And by the late statutes 7 Will. IV. & 1 Vict. c. 78 (*h*), and 6 & 7 Vict. c. 89, it is further enacted, that every application to the Queen's Bench, for the purpose of calling upon any per-

at his or their instance, as relator or relators; and such person or persons shall be deemed to be the relator or relators, in case such rule shall be made absolute, and shall be named as such relator or relators in such information, in case the same shall be filed, unless the court shall otherwise order. See R. *v.* Hedges, 11 Ad. & El. 163; R. *v.* Anderson, 2 Ad. & E. N. S. 740. * As to who may be relator, R. *v.* Parry, 6 Ad. & El. 810; R. *v.* Greene, 2 Q. B. 460. Et vide 6 & 7 Vict. c. 89, s. 5, as to the notice to be given to the opposite party of the application, &c.

(*f*) But an information in *quo warranto* cannot be brought against a body corporate at large, for acting as a corporation, unless at the instance of the attorney-general. R. *v.* White, 5 Ad. & El. 613.

(*g*) By 6 & 7 Vict. c. 89, s. 5, the court may order the venue in informations in *quo warranto* to be laid in Middlesex or London, and the trial to take place therein.

(*h*) Sect. 23.

son to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporation Act, shall be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified; and that no election of any mayor shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor to which he may have been previously elected, unless application shall have been made to the Court of Queen's Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor, within twelve months after his election thereto; and that every election to the office of mayor, alderman, councillor, or any other corporate office within the said boroughs, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

V. The writ of *Habeas Corpus*. This is the most celebrated writ in the English law, and the great remedy which it has provided for the violation of the right of personal liberty (*i*). We had occasion in the first volume (*k*), to make some remarks upon this writ, but a more particular detail of its history, and the practice connected with it, may here be acceptable.

(*i*) As to the remedy by action for false imprisonment, vide sup. p. 472. Blackstone notices, besides the *habeas corpus*, three other writs for removing the injury of false imprisonment: 1st, the writ of *mainprize*, *manucaptio*, commanding the sheriff to take sureties for the appearance of the prisoner, usually called *mainpernors*, and to set him at large; 2nd, The writ *de odio et atia*, commanding the sheriff to inquire whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et atiam*, for hatred and ill will, with the view, if the latter was found the case, of afterwards issuing another writ to admit him to bail; 3rdly, the writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that he shall answer any charge against him. (3 Bl. Com. 128.) All these remedies however have long fallen into complete disuse.

(*k*) Vide sup. vol. I. p. 145.

In the first place, we may remark that the vindication of liberty, though the principal, is not the only purpose to which it is applied; for, of the *habeas corpus* [there are various kinds made use of by the courts at Westminster, for removing prisoners from one court to another, for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above (*l*). Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with the process of execution (*m*). Such are also those *ad prosequendum, testificandum, deliberandum, &c.* which issue when it is necessary to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed (*n*). Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the

(*l*) Jones's case, 2 Mod. 198.

(*m*) 2 Lilly, Pract. Reg. 4; Gibb v. King, 1 C. B. 1. By 15 & 16 Vict. c. 76, s. 127, a *habeas corpus ad satisfaciendum* shall not in future be necessary to charge in execution a person already in the prison of the court; but he may be charged in execution by a judge's order, made on affidavit that judgment has been signed; and if not satisfied, service of such order on the gaoler shall have the effect of a detainer.

(*n*) As to writs of *habeas corpus ad testificandum, &c.*, see 43 Geo. 3, c. 140, and 44 Geo. 3, c. 102; Graham v. Glover, 5 Ell. & Bl. 591; Marsden v. Overbury, 18 C. B. 34. By 16 & 17 Vict. c. 30, s. 9, it is provided, that one of her majesty's principal secretaries of state, or a judge of one of the superior common law courts, may at his discretion issue a warrant or order for bringing up a prisoner confined in any gaol (except under process in a civil suit), before any judicature to be examined as a witness, and he shall be dealt with in the same manner as a prisoner brought up by *habeas corpus* is to be dealt with. And by 19 & 20 Vict. c. 108, s. 31, a similar power is given to the judge of a county court.

[defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ* (*o*),) to *do and receive* whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right without any motion in court (*p*), and it instantly supersedes all proceedings in the court below; but in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13, that no *habeas corpus* shall issue to remove any prisoner out of any gaol unless signed by some judge of the court out of which it is awarded; and, to avoid vexatious delays, by removal of frivolous causes, it is enacted by 21 Jac. I. c. 23, that where the judge of an inferior court of record is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus*, or other writ, after issue or demurrer,] unless joined within six weeks after appearance; and [by statute 19 Geo. III. c. 70, that no cause under the value of ten pounds,] (which was by 7 & 8 Geo. IV. c. 71, s. 6, extended to causes under the value of twenty pounds,) [shall be removed by *habeas corpus*, or otherwise, into any superior court, unless the defendant, so removing the same, shall give special bail for payment of the debt and costs (*q*).]

[But the most important species of habeas corpus is that of *habeas corpus ad subjiciendum* (*r*); which is the remedy

(*o*) As to writs of *habeas corpus cum causâ*, see Bowerbank *v.* Walker, 2 Chit. 517; Clack *v.* Dixon, 3 M. & S. 93; Lawes *v.* Hutchinson, 5 Tyr. 236; Mitchell *v.* Mitchenham, 1 B. & C. 513; Blanchard *v.* De la Crouée, 9 Q. B. 869; Reg. Gen. Hil. T. 1853, (Pr.) r. 115—117; Lush's Pr. p. 758, n. (*g*), 2nd edit.

(*p*) Penrice and Wynn's case, 2 Mod. 306.

(*q*) The bail must be put in within eight days after the writ is allowed. Reg. Gen. Hil. T. 1853, (Pr.) r. 116. As to the removal of causes from the *County Court* by *certiorari*, vide post, p. 722.

(*r*) As to the writ of *habeas corpus ad subjiciendum*, &c., see R. *v.* Greenhill, 4 Ad. & E. 624; Easton's case, 12 Ad. & E. 645; R. *v.* Batcheldor, 1 Per. & D. 516; S. C. nom. Leonard Watson's case, 9 Ad. & E. 731; Ford *v.* Nassau, 1 Dowl. N. S. 631; In re Parker, 5 Mee. & W. 32; Jones *v.* Danvers, ibid. 234; Carus Wilson's case, 7 Q. B. 984; Queen *v.* Brenan, 16 L. J. (Q. B.) 289; In re Dunn, 17 L. J. (Q. B.) 97; Re Andrews, 4 C. B. 226.

[used for the deliverance from illegal confinement. This is directed to any person who detains another in custody; and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*,—to do, submit to, and receive whatsoever the judge or court awarding such writ, shall consider in that behalf (*s*). This is a high prerogative writ]; and issues out of any of the superior courts at Westminster, including the Court of Chancery (*t*), not only in term time, but also during the vacation (*u*), and runs into all parts of the dominions of the Crown (*x*); [for the Queen is at all times entitled to have an account why the liberty of any of her subjects is restrained (*y*), whenever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon (*z*), unless the term should intervene, and then it may be returned in court (*a*).] It is necessary to apply for this writ, by motion to the court, or application to a judge, (as the case may be,) supported by affidavit of the facts (*b*). [For, as was argued by Lord Chief Justice Vaughan (*c*), "it is granted on motion, because it cannot be had of course; and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner (*d*). So that if it issued of mere course, without showing to the

(*s*) State Trials, viii. 142.

(*t*) 31 Car. 2, c. 2, s. 10; 56 Geo. 3, c. 100, s. 2. The Lord Chancellor can issue the writ of *habeas corpus* at common law, in vacation. Crowley's case, 2 Swanst. 1.

(*u*) See Wood's case, 3 Wils. 172; Leonard Watson's case, 9 Ad. & E. 731.

(*x*) As to Jersey, Guernsey, &c., vide Carus Wilson's case, 7 Q. B. 984, ubi sup.; Queen v. Brenan, 16 L. J. (Q. B.) 289.

(*y*) Bourn's case, Cro. Jac. 543.

(*z*) R. v. Clarke, Burr. 606.

(*a*) Ibid. 460.

(*b*) Hobhouse's case, 3 B. & Ald. 420.

(*c*) Bushel's case, 2 Jon. 13.

(*d*) Bourn's case, Cro. Jac. 543.

court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court.

And therefore Sir Edward Coke, when chief justice, did not scruple in the thirteenth year of James the first to deny a habeas corpus to one confined by the Court of Admiralty for piracy, there appearing, upon his own showing, sufficient grounds to confine him (*e*). On the other hand, if a probable ground be shown that the party is imprisoned without just cause (*f*), and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the king, privy council, or any other (*g*).

In a former part of these Commentaries (*h*) we expatiated at large upon the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long suc-

(*e*) R. *v.* Marsh, 3 Bulstr. 27; see also White *v.* Wiltshire, 2 Roll. Rep. 138.

(*f*) 2 Inst. 615.

(*g*) Com. Journ. 1 Apr. 1628.

(*h*) Vide sup. vol. I. p. 145.

[cession of statutes enacted under Edward the third. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.

This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand, the prisoner.

And yet early in the reign of Charles the first, the Court of King's Bench, relying on some arbitrary precedents (and those, perhaps, misunderstood, determined (*i*) that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the first, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms, (including also the long vacation,) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment (*k*).]

(*i*) State Trials, vii. 136.

(*k*) Sir Nicholas Hyde, chief justice, also said on that occasion "that "if they were again remanded for

The difficulties thus allowed to impede the application of the writ [gave rise to the statute 16 Car. I. c. 10, s. 8, whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the Court of King's Bench or Common Pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall (*l*),] new impediments were permitted to delay the release of the party imprisoned (*m*); [the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum, &c.*, whereby the prisoner was discharged at the Old Bailey (*n*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were

" that court, perhaps the court would " not afterwards grant a *habeas corpus*, being already made acquainted " with the cause of the imprisonment." State Trials, vii. 240, of which Selden himself afterwards gives the following account: "*Etiam judicum tunc primarius, nisi illud faceremus, rescripti illius forensis, qui libertatis personalis omnimodæ vindex legitimus est fere solus, usum omnimodum palam pronuntiavit, (sui semper similis,) nobis perpetuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censitum.*" (Vindic. Mar. Claus. edit. A.D. 1653.)

(*l*) State Trials, vii. 471.

(*m*) The expression of Blackstone is, that " new shifts and devices were " made use of to prevent his en- " largement by law." But there is perhaps no ground for imputing intentional oppression.

(*n*) See Crowley's case, 2 Swans. 1.

[practised to detain state prisoners in custody.] These abuses at length gave birth to [the famous *Habeas Corpus* Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* of the kingdom; and by consequence and analogy has also, in subsequent times, reduced the general method of proceeding on these writs, (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of law and liberty (*o*).

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor or any of the judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper

(*o*) Bishop Burnet relates a circumstance respecting the *habeas corpus* act, which is more curious than creditable; and though we cannot be induced to suppose that this important statute was obtained by a jest and a fraud, yet the story proves that a very formidable opposition was made to it at that time. "It was carried" (says he) "by "an odd artifice in the House of "Lords. Lord Grey and Lord Nor- "ris were named to be the tellers; "Lord Norris, being a man subject "to vapours, was not at all times "attentive to what he was doing, so "a very fat lord coming in, Lord "Grey counted him for ten as a "jest at first, but seeing Lord Norris "had not observed it, he went on "with his misreckoning of ten; so "it was reported to the house, and "declared that they who were for "the bill, were the majority; though "it indeed went on the other side; "and by this means the bill past." —1 Burnet, Hist. Car. II. 485.—(Christian's Blackstone.)

[court of judicature (*q*). 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*r*). 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, the first week of the next Term, or the first day of the next session of *oyer* and *terminer*, be indicted in that Term or session, or else admitted to bail—unless the witnesses for the Crown cannot be produced at that time; and if acquitted, or if not indicted and tried in the second Term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assizes. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as out of the Queen's Bench; or Common Pleas; and the lord chancellor or judges denying the same, on

(*q*) Where the writ issues in vacation, returnable immediately before a judge at chambers, it does not expire by the commencement of the Term. Rex *v.* Shebbeare, 1 Burr. 460.

(*r*) A person sent over from Ireland under a warrant from the secretary of state from Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is entitled to a copy of the warrant, under the *habeas corpus* act, after it has been demanded. Sedley *v.* Arbouin, 3 Esp. 194.

[sight of the warrant, or oath that the same is refused, shall forfeit severally to the party grieved, the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England, Wales, or Berwick, (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent,) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l.*; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire;* and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charges as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left,] by that statute, [to the *habeas corpus* at common law (*s*).] But to render the remedy more effectual even in those cases, than it was at common law, it has been since provided by 56 Geo. III. c. 100—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit,) any of the barons of the exchequer of the degree of the *coif*, or any of the justices of either bench, shall upon *affidavit* showing a probable and reasonable ground for

(*s*) "Even upon writs of *habeas* "*corpus* at the common law," says Blackstone (vol. iii. p. 137), "it is "now expected by the court, agree-"able to antient precedents and the "spirit of the act of parliament, "that the writ should be *imme-*"*diately* obeyed, without waiting "for any *alias* or *pluries;* otherwise "an attachment will issue." Et vide R. v. Cowle, 2 Burr. 856.

such complaint, award in vacation time a writ of *habeas corpus*, under the seal of the court whereof he is a judge, directed to the person in whose custody the party is confined, which shall be returnable immediately before himself, or any other judge of the court. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the party guilty of such contempt. 3. That if the writ should be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in the court to which the judge by whom it is awarded belongs, on a certain day in the next Term. 4. That if such writ shall be awarded by the Court itself of Queen's Bench, Common Pleas, or Exchequer, so late that it cannot be conveniently obeyed during the Term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts—and if it appears doubtful to him whether they be true or not, it shall be lawful for such judge to let to bail the person so confined, upon his entering into a recognizance to appear in the court to which the judge belongs in the Term following; which court may proceed to examine into the truth of the facts in a summary way by *affidavit*, and to order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus*, awarded in pursuance of the act of the thirty-first year of Charles the second. Lastly, that the *habeas corpus* according to this act of 56 Geo. III. c. 100, may run into any county palatine or cinque port, or other privileged place, or the Islands of Jersey, Guernsey, and Man, or any port, harbour, road,

creek, or bay, upon the coast of England or Wales, lying out of the body of any county.

By which admirable regulations the remedy seems now to be complete for removing the injury of illegal confinement, [a remedy the more necessary,] says Blackstone (*t*), [because the oppression does not always arise from the ill nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, (and has happened in England during the temporary suspension of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.]

VI. The writ of *Certiorari*. This issues out of the Court of Chancery, or a superior court of the common law (*u*), directed in the queen's name to the judges or officers of inferior courts of record (*v*), commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice. This writ may be had either in criminal or civil cases. For in the former, the Queen's Bench has a superintendence over all inferior courts, and may remove the indictments or other proceedings therein depending, and transfer them to its own jurisdiction (*x*). But the consideration of this use of the writ, belongs more properly to the next volume of these Commentaries: and our attention is at present called to its application in civil cases only. Its object here, is similar in general to that of the *habeas corpus cum causâ* (*y*)—that is, to obtain relief from some inconvenience supposed, in the particular case, to arise from a cause being allowed to proceed to trial before an inferior jurisdiction

(*t*) 3 Bl. Com. p. 138.

(*u*) As to the Court of Exchequer, see In re Allison, 10 Exch. 561.

(*v*) Bac. Abr. Certiorari A. As to courts not of record, see Ex parte Phillips, 2 Ad. & Ell. 586.

(*x*) As to the removal of *indictments* or *inquisitions* by *certiorari*, see 16 Vict. c. 30, ss. 4—8; and 19 & 20 Vict. c. 16.

(*y*) Vide sup. p. 712.

less capable than the superior court, of rendering complete and effectual justice (z).

There is, however, this distinction between the two modes of remedy, that, by the *habeas corpus cum causâ*, the person of the defendant, (when he is in custody,) as well as the proceedings in the cause, are capable of being removed from the court below,—while the writ of *certiorari* affects the proceedings only (a). So that where an arrest of the defendant has taken place in the inferior court, it is usual to resort to a *habeas corpus*, rather than a *certiorari*. The provisions before cited from the acts 1 & 2 P. & M. c. 13; 21 Jac. I. c. 23; 19 Geo. III. c. 70; 7 & 8 Geo. IV. c. 71, restrictive of the application of the writ of *habeas corpus cum causâ*, apply equally to the writ now in question: and the Acts relative to the County Courts, also impose several restrictions as to the removal of causes from those courts, by *certiorari* (b). But, on the other hand, it is enacted by 8 & 9 Vict. c. 127, s. 21, that any suit instituted in a court for recovery of small debts within the meaning of that Act, (which does not, however, extend to the County Courts,) wherein the claim or demand shall exceed 10*l.*, shall be removeable by *certiorari* or otherwise into any of the superior courts of common law, by leave of a judge, and on such terms as he shall order.

(z) It is a general rule that a *certiorari* will not lie to remove a cause from an inferior court after judgment. (Walker *v.* Gann, 7 D. & R. 769.) As to the practice in the superior courts, in causes removed from the inferior, see Reg. Gen. H. T. 1853 (Pr.), rr. 115—117.

(a) See Doe *v.* Dring, 1 B. & C. 253.

(b) See 9 & 10 Vict. c. 95, s. 90; 13 & 14 Vict. c. 61, s. 16; 19 & 20 Vict. c. 108, ss. 38, 40—42, 44, 49, 67, 71.

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LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.